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IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1976

No. 76-799

NATIONAL LABOR RELATIONS BOARD,

Respondent

-vs-

ALBERTS, INC., and DETROIT SHOE COMPANY,

Petitioner

RETAIL AND DEPARTMENT STORE EMPLOYEES, AMALGAMATED CLOTHING, WORKERS OF AMERICA, AFL-CIO,

Intervenor

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

ALBERTS, INC. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case which affirmed the decision of the National Labor Relations Board.

Opinion Below

The opinion of the Court of Appeals, which is unreported, is appended to this petition.[1] The opinion of

[1] The appendix to this Petition contains the decisions below and relevant portions of the record.

the National Labor Relations Board, a copy of which is appended to this petition, is reported at 213 NLRB No. 94.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC §1254. The judgment of the Court of Appeals was entered on September 28, 1976.

Questions Presented for Review

1. Whether the Court of Appeals erred in affirming the certification of a collective bargaining unit comprised of a single store out of a 48-store chain.

2. Whether the Court of Appeals erred in holding that a rule limiting solicitation promulgated by petitioner, a retailer, was invalid because of certain language in the rule which has never been asserted as a basis for invalidity by any other circuit court.

Ordinances and Constitutional Provisions Involved

This case involves application of Sections 8(a)1, 8(a)5 and 9(b) of the National Labor Relations Act as amended, 29 USC §151, et. seq. ("Act"), the relevant portions of which provide:

> Sec. 8(a) It shall be an unfair labor practice for an employer —
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> Sec. 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for

> the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Statement of the Case

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in affirming the decision of the National Labor Relations Board ("Board") ruled contrary to every other circuit court which has decided the appropriateness of a collective bargaining unit in a multi-store retail chain and the validity of a "no-solicitation rule", issues which are of real import to the law of labor relations. The issues presented by this case represent important policy considerations with respect to labor relations in a retail enterprise, and are of general significance to that portion of the economy. Moreover, the decision of the D.C. Circuit is in direct conflict with decisions of other circuits. The Supreme Court should end the conflict and thus eliminate the uncertainty and instability in the field of labor relations created by the split of authority now established by the D.C. Circuit.

A. Facts Relating to Unit Determination

1. Background.

Alberts, Inc. ("petitioner", "Alberts" or "company")[2] owns and operates a chain of women's clothing stores. At the time of the Board hearing in this case in September 1973, Alberts owned 48 stores, 24 of which were in the Detroit metropolitan area. There were approximately 470 persons employed by Alberts in those 24 Detroit area stores. On March 6, 1973, the Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO ("union") filed a petition for representation of all selling and non-selling

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[2] Detroit Shoe Company operates a ladies' shoe department in certain of Alberts stores and is considered a joint employer.

employees employed at the Alberts store in the Universal City Shopping Center in Warren, Michigan ("Universal store") which is located in the Detroit metropolitan area. On March 23, 1973, a representation hearing was held in Detroit wherein the principal issue raised was whether the single Universal store with 23 employees constituted an appropriate unit for collective bargaining purposes within Section 9(b) of the Act. The Regional Director for the Seventh Region of the National Labor Relations Board ruled that the single store unit was appropriate. The Board subsequently denied Alberts' Request for Review of that decision.

In May 1973, the union filed a petition for representation of Alberts' employees in its store in the General Motors Building, Detroit, Michigan ("GM store"). The Regional Director, following the precedent of the Universal case, ruled that the single store unit which employed only six people was appropriate. Again, Alberts' Request for Review was denied by the Board.

The company refused the union's demand for bargaining at the Universal store and the union began the unfair labor practice proceeding. The Board's Administrative Law Judge, although refusing to relitigate the unit issue in the unfair labor practice case, did take judicial notice of the records in both the Universal and GM store cases (App. 37, 38)[3]. The Board and the D.C. Circuit both affirmed the original unit determination of the Regional Director.

The evidence presented at the Universal and GM representation hearings unequivocally establishes that the formulation and administration of Alberts' labor policy and the decisions regarding store operations in the Detroit metropolitan area are handled on a highly centralized, uniform basis. In view of such facts, the Regional Director erred in holding that a single store out of Alberts' chain constitutes an appropriate unit. The Board, which never fully considered the facts,

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3 References to the record reproduced in the appendix are designated (App.).

perpetuated the error by denying Alberts' Request for Review. It is the D.C. Circuit's affirmance of this erroneous unit decision which forms the basis for the principal point on which Supreme Court review is sought.

2. Alberts' Labor Policy is Formulated and Administered in a Centralized Manner.

Alberts' labor policy is established and administered with respect to all stores in the chain on a uniform basis out of Alberts' main office in Ferndale, Michigan which is within the Detroit metropolitan area. (Decision of Regional Director in Universal case; App. 27-36). Individual store managers have no authority to modify this policy. The store manager's responsibility is limited to the day-to-day operation of the store. Many decisions, especially those regarding personnel matters are controlled by one of the three district supervisors responsible for the 24 stores in the Detroit area.

Alberts' payroll is centrally managed and all decisions relative to both pay rates and fringe benefit levels are made by the President of the company (App. 72, 73). Alberts has standard starting rates for all job classifications, and a store manager must get explicit approval from his district supervisor before any variation from these basic rates is granted (App. 67, 68, 78, 79, 82-83). Further, if a store manager wishes to grant any of his employees a merit raise, he must first get the approval of his district supervisor.

All fringe benefits are also centrally determined. Vacation time, sick leave, holiday pay, health insurance and employee discounts for employees in the stores are determined by the payroll department of Alberts' central office in Ferndale (App. 61). These benefits are uniform throughout the entire Detroit metropolitan area. (App. 60, 73-75).

Individual store managers do not have authority to hire or fire employees without first consulting with both the district supervisor and Alberts' director of security. Applications for employment are initially submitted by store managers to the district supervisor (App. 63, 64).

If an applicant is approved by both the district supervisor and security director, a job offer is made. In no instance is a store manager permitted to hire an applicant without following this uniform procedure. Similarly, decisions to discharge or lay off may not be made by a store manager independently. All such decisions must be approved by the district supervisor.

Even routine functions such as the establishment of store hours and the scheduling in the individual stores are determined by district supervisors rather than by the individual store managers (App. 80-82). The supervisors review, and on occasion, change, scheduling determinations made by an individual store manager. Although the manager does decide which specific employee schedules are to be changed, this function is essentially ministerial, as the decision as to the number and nature of schedule changes is always made by the district supervisor (App. 84, 85).

The company has an informal grievance procedure under which all employees are encouraged to take their grievances to the district supervisors or executives of the company, up to and including Alberts' President. All store managers know that they are answerable to their district supervisors and Company executives for any conduct on their part giving rise to an employee grievance (App. 85-87).

3. Decisions with Respect to Store Operations are Centrally Made.

The evidence presented at both of the representation hearings shows without question that Alberts' operations in the Detroit area are highly centralized, with company executives and district supervisors directing the operations of the individual stores, and with individual store managers having authority to act independently on only the most minor and routine matters. It is the responsibility of district supervisors to insure that operations remain uniform throughout the entire Alberts' system (App. 50, 71, 80, 81).

Alberts employs approximately 12 buyers who work

out of the Ferndale office. It is the function of the buyers to visit each store, determine its needs and purchase the necessary merchandise. All decisions with respect to purchases and pricing of merchandise are made by the buyers (App. 70, 71, 76, 77). No store manager ever makes a decision with respect to the nature or price of merchandise in a store (App. 50-52). In addition, all advertising is handled centrally. A store manager cannot place an advertisement independently (App. 54). All warehousing operations are handled centrally out of the company warehouse in Ferndale. There is no warehousing function carried on by any individual store (App. 54).

The company employs a credit executive who processes and reviews all credit applications. The only function a store manager has with respect to the extension of credit is to forward an application to the company office. A store manager can then accept credit only when the customer has a credit card issued by the company (App. 54-55). If customers are delinquent in their payments, collections are handled exclusively by the central office (App. 54).

In addition to the centralized operations described above, Alberts utilizes a number of other company-wide systems which directly bear on store operations and working conditions of store employees. For example, Alberts utilizes outside "shoppers" who shop at company stores and evaluate store operations and the performance of store personnel (App. 58). The reports of the "shoppers" are evaluated by the district supervisors and then reviewed with the store managers. The use of this service aids the company in making employment determinations and is further evidence of the store manager's restricted authority with respect to such determinations.

Further evidence of company-wide control of store operations is the company's use of a single person, from company headquarters, to train and supervise all store cashiers. She trains each new cashier in the operation of the cash-register and the preparation of daily cash reports. In addition, she handles the transfers of cashiers

between stores (App. 52, 53). Alberts has a security policy applied uniformly throughout the company chain (App. 59).

4. Employees and Merchandise are Frequently Transferred Among the Alberts Stores in the Detroit Area.

On a number of occasions there has been a need to transfer personnel both permanently and temporarily among Alberts' various store locations in the Detroit area. As a result of store closings and openings, changes in business, and promotional activities, there is a great deal of mobility of employees among the 24 stores. All decisions with respect to transfers are made by Alberts' personnel director and the district supervisors. Store managers do not determine when a transfer is to be made or which employee is to be transferred (App. 66).

The interchange of company employees between stores is a common occurrence. In two instances following store closings the employees of the closed stores were permanently transferred to other company stores (App. 56, 57). Temporary transfers between stores in and around Detroit is also occasioned by illness, vacations, store openings, and special promotions, such as "Downtown Detroit Days" (App. 56, 57, 62).

From both the number of transfers and the number of people involved in the transfers, it becomes clear there is a substantial interchange of company personnel and that such interchange is an integral part of the overall company operations.

In addition to employee transfers, there is a great deal of merchandise transfer handled by the central office. Alberts operates a "unit control" out of its Ferndale office for the purpose of transferring merchandise among the various stores (App. 65). When a store needs a certain item but does not have it in stock, the employee at the store who needs the merchandise calls "unit control" to find out which store has the item. During March and April 1973 there were 73 transfers of goods to and from the GM store alone. It was estimated that each transfer required about four interstore phone

calls (App. 69). The frequent transfers are indicative of the highly-integrated nature of Alberts' operations. The system for the interstore transfer of merchandise is significant to the unit determination because of the substantial amount of contact between sales employees of the various stores which is required thereby.

5. Factual Summary

In every aspect of Alberts' operations, including the establishment of labor policy and administrative decision-making, one factor is prevalent: there is a substantial centralized control which is not merely theoretical, it is applied on a daily basis. The records in the representation hearings which include the testimony of all levels of company management demonstrate that (1) individual stores and store managers do not have significant autonomy; (2) most aspects of store operations are governed centrally; (3) all decisions with respect to employment practices are centrally made; and (4) there is substantial interchange of employees among the Detroit-area stores, both permanent and temporary.

The combination of the factors listed above, along with the proximity of the 24 Detroit area stores, in view of recent decisions concerning bargaining unit appropriateness dictate that a single store unit is inappropriate.

B. Facts Relating to Alberts' "No-Solicitation" Rule

In late February, 1973, the management of Alberts first became aware of union activity in a number of its stores in the Detroit metropolitan area (App. 44). The company was concerned with the maintenance of retail operations without undue interruption from union organizing activity. During previous union organization campaigns, Alberts experienced disruption of its operations and "disservice to customers" (App. 46, 47).

The company advised all employees in the Detroit area stores of their rights with respect to union activity and restated in writing the long-standing company rule prohibiting solicitations during working hours on the

selling floor (App. 48). A two-page memorandum (App. 39, 40) outlining those rights and explaining the applicability of the no-solicitation rule to union activity was distributed to all the employees in those stores.

The memorandum restating the rule against solicitation provides in pertinent part:

> During the time that the union is trying to organize the employees, the company will expect employees to render their usual good service to the company and union organizers will not be allowed to discuss the union during working hours on company property. Employees who desire to discuss the union between themselves may do so during non-working hours, making sure that their discussions do not interrupt their normal work. (emphasis added)

Alberts had maintained a policy prohibiting solicitation or other work-interrupting activity on its selling floors for as long as any witness was able to recall (App. 42, 43, 46-49). As a result of management's concern that union solicitation would be likely to distract employees to the detriment of service to customers, the no-solicitation rule was published to inform all employees that certain union activity was encompassed by the rule (App. 44-47). The Board held that the rule is invalid on its face. This holding which was affirmed by the D.C. Circuit is contrary to all other circuit court decisions considering the validity of no-solicitation rules, particularly in view of the latitude given retail businesses with respect to the implementation of such rules.

REASONS FOR GRANTING THE WRIT

A. The Decision Below is Contrary to the Principle Established by the Various Circuit Courts that Single Store Units are Inappropriate in a Multi-Store Centralized Operation.

Alberts was found to be in violation of Section 8(a)(5) of the Act for refusing to bargain with the union. That refusal, however, was perfectly proper as the single store unit was inappropriate. The D.C. Circuit's decision in this case, which actually affirmed the decision of the Regional Director (the Board itself never fully considered the unit issue as Alberts' Requests for Review in the representation proceedings were denied and "relitigation" of the issue was not permitted in the unfair labor practice case), is directly contrary to the prevailing view among the various circuit courts. The decision creates the ludicrous possibility of 48 separate bargaining units within a centralized retail operation with a uniform labor policy.

The basic considerations involved in determining the appropriateness of a multi-store, as opposed to a single store unit, were summarized by the Sixth Circuit Court of Appeals in Wayne Oakland Bank v. NLRB, 462 F2d 666 (CA 6, 1972), a case involving a multi-branch bank operating in the Detroit metropolitan area. The Court said at pages 667-668:

> Each of the cases which has considered the issue of the appropriateness of a bargaining unit has focused on the nature and extent of centralization of operations. The courts have found that the most important factors entering into the determination of the unit are: First, the extent of the centralized control of the commercial and administrative aspects of the business and, Second, the extent of centralized control of labor policy. This second factor involves consideration of where matters subject to collective bargaining, such as wage and fringe benefits, are determined, i.e., whether the responsibility resides in the main office or with

> the branch supervisor. In addition consideration must be given to the extent of employee interchange between branches. The courts have not hesitated to set aside a finding of the appropriateness of a branch as a bargaining unit where evidence showed centralized control over the principal aspects of operations and employee relations. NLRB v. Purity Food Stores, Inc., 376 F2d 497 (CA 1, 1967); NLRB v. Davis Cafeteria, Inc., 396 F2d 18 (CA 5, 1968); NLRB v. Solis Theatre Corp., 403 F2d 381 (CA 2, 1968); NLRB v. Pinkerton's, Inc., 428 F2d 479 (CA 6, 1970). (emphasis added)

The application of the principles set forth in the Wayne Oakland Bank decision to the facts of the Alberts' operation — namely, centralized control over store operations; constant interchange of employees and merchandise; centralized control over all subjects of collective bargaining— unequivocally demonstrates that a single store unit, the Universal Mall store, is inappropriate. The contrary decision below cries out for reversal, as it is inapposite to the authorities and contrary to any notion of equity and common sense.

The Regional Director's determination that the Universal store is an appropriate bargaining unit, is based in large part upon the conclusion that the individual store managers are "clothed with substantial autonomy". The record discloses, however, that the only managerial decisions not subject to approval by a district supervisor or company executives are the granting of small merit raises, the selection of employees to be affected by a schedule change ordered by the company and the normal day-to-day supervision of work.

It has been repeatedly held that such limited authority on the part of an individual store manager, in a highly centralized operation, will not render an otherwise inappropriate single store unit appropriate. In NLRB v. Solis Theatre Corp., 403 F2d 381 (CA 2, 1968), where the union sought a unit consisting of one theatre in a theatre chain, the Second Circuit Court of Appeals said at page 383:

> In large part, the Board based its unit determination on the role of the local manager of (the single theatre), but the evidence shows that his authority is limited to little more than overseeing the daily activities of the employees. For example, he disciplines and reprimands employees, initially interviews job applicants, although the final decisions on hiring and firing are made by (the central office), and prepares and submits vacation schedules for approval by (the central office). It appears, therefore, that instead of being in a decision making position, the 'manager' has little or no authority on labor policy but is subject to detailed instructions from the central office.

Similarly, although an Alberts' manager has a certain amount of minor authority, he is, like the manager of a Solis theatre, subject to "detailed instruction" from the central office, with no authority to resolve on his own issues which would be the normal subject of collective bargaining.

The Fifth Circuit Court of Appeals faced a similar situation in NLRB v. Davis Cafeteria, Inc., 396 F2d 18 (CA 5, 1968), where the union sought certification of a unit consisting of two out of a chain of eight cafeterias. After reviewing the factors relied upon by the Board in its decision to splinter the unit, the Court said at pages 20-21:

> Notwithstanding these most compelling facts, the Board determined that each cafeteria manager had sufficient autonomy to render each cafeteria an appropriate unit. An examination of the factors upon which reliance was placed, in light of the entire record, demonstrates that they do not constitute any sort of local managerial authority over substantive subjects of collective bargaining. While the local manager does have authority to order food and supplies for his cafeteria, the record is clear that he may only use a list of suppliers and prices issued by the general office. Both the general office and

the local managers have authority to hire and fire employees, but the fact that the local manager has this authority does not alone make his cafeteria an appropriate unit. NLRB v. Frisch's Big Boy Ill-Mar., Inc., 356 F2d 895 (CA 7, 1966). The manager may obligate the company's credit, but only for certain cleaning supplies within a limit set by the general office. Managers do not have authority to grant wage increases, but may recommend raises to the general office. Each cafeteria has a separate bank account, but the manager has no authority to draw on it.

. . .

In the circumstances of this case, labor policy is centrally determined, and where local managers do not have authority to decide questions which would be subjects of collective bargaining, the two respondent cafeterias do not constitute an appropriate bargaining unit. (emphasis added)

The manager of a Davis cafeteria had, in areas such as discipline and ordering of merchandise, greater authority than the manager of an Alberts store. Yet, the lack of authority in the managers to determine collective bargaining-type issues mandated a finding that individual cafeteria units, comparable to the individual Alberts stores in the present case, were inappropriate.

In NLRB v. Frisch's Big Boy Ill-Mar, Inc., 356 F2d 895 (CA 7, 1966), relied upon by the Davis court, the Seventh Circuit Court of Appeals reversed the Board's certification of a single-restaurant unit out of a chain of ten restaurants. (The Board decision which was reversed was cited below by the Board as support for the single-store unit determination). The Board in the Frisch's case had based its decision on the authority exercised by the individual manager. The Court held, however, that when the exercise of these powers was at every point subject to the authority of an area supervisor, such authority could not justify a single-restaurant unit. The Court said at pages 896-897:

The only factual contention made by petitioner which requires notice is that each restaurant has 'autonomy' because each restaurant manager has certain powers. However, the undisputed facts appearing in the record show that a common labor policy affecting all employees is formulated and administered by the president, as chief executive, and certain other officers of the corporation. Reporting to him are three area supervisors each of which has a share of the Indianapolis restaurants to cover. The area supervisors visit the restaurants frequently. The managers' duties include the telephoning to local suppliers who have been selected and have entered into agreements negotiated by the president. The managers receive supplies and forward invoices, and cash sales records to the general office each day.

From the record it appears that the rules of eligibility and procedures affecting employment applications are established by the president for all restaurants. Uniform hiring rates are set by him. While a manager may hire an employee for his own store, he may not agree to pay above the minimum unless approved in advance by a supervisor. Salary increases announced by any manager are based on the authority of a supervisor.

It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining.

It is to be noted that the organization of the restaurant system in Big Boy is quite similar to that of the Alberts stores, with the Big Boy area supervisors performing much the same function as the Alberts district supervisors. Such a centralization of supervisory authority made a single-restaurant unit inappropriate, and renders the single store unit in the present case equally inappropriate.

The underlying principle on which these court decisions were grounded was well stated in Michigan Bell Telephone Company and Communication Workers of America, 192 NLRB No. 178 where, in considering the appropriateness of a single office out of many, the dissenting Board members said:

> While giving sanction to an individual office may serve the expedient purpose of making organization of employees easier, it is difficult to conceive of meaningful bargaining taking place if the employees choose to designate the petitioner as their agent for this purpose. An employer who has consistently established wage levels, fringe benefits and the entire gamut of labor relations polices on a much broader basis both for organized and unorganized groups of employees is hardly likely to be willing to let a tail this size wag the dog. (emphasis added)

In the present case all of Alberts' labor policy is determined and applied on a uniform basis. There is not a single subject of collective bargaining upon which an individual store manager may act independently. Clearly, a "tail" the size of a single store will not "wag the dog" which consists of 48 stores. A unit which cannot impact upon labor policy is disruptive to company operations and is inappropriate for both the company as a whole and the employees within the unit.

The circuit courts for the second, fifth, sixth and seventh circuits have thus held that single store units are inappropriate under factual situations virtually identical to Alberts.

Not only is the unit decision herein contrary to applicable circuit courts decisions, it is also contrary to cases where the Board itself has found a single store unit to be inappropriate. In Twenty-First Century Restaurant of Nostrand Avenue Corp., 192 NLRB No. 103 (1971), the union sought a unit consisting of one of the employer's twenty-two fast food restaurants in the New York-New Jersey area. The Board, holding a single restaurant unit to be inappropriate, cited the following factors as controlling in its decision:

1. General company policy such as merchandising, advertising and labor matters was formulated centrally by company executives.

2. The administration of labor relations matters was handled centrally.

3. Each store handled the same merchandise.

4. Each store manager had little autonomy with the exception of hiring new employees.

5. The district supervisors played an important role in store operations.

In Gray Drug Stores, Inc., and Retail Clerks Union Local 1625, 197 NLRB No. 105 (1972), the issue before the Board was whether a single store, county-wide, two county or state-wide bargaining unit would be appropriate for the employer's drug store operations. In reaching its conclusion that a two county rather than single store or single county unit was appropriate the Board listed the following factors as determinative:

1. The employees of the single store or single county did not comprise a homogeneous, identifiable and distinct group.

2. There was common supervision of employees by the district manager.

3. There was little autonomy at the single-store level.

4. There was interchange of employees between stores in the two counties.

The Board found that the individual store managers lacked authority in "personnel, labor relations, merchandising and other matters" and that the district manager played an extensive role in the store operations.

The managers of individual Gray drug stores control the day-to-day activity of their store. As is the case

with Alberts' managers, their main function is to run the store, direct the work force and maintain inventory levels. Neither the Gray managers nor the Alberts' managers play an independent role in decisions involving labor relations. They cannot discharge employees, they cannot independently hire employees and they cannot even implement work and vacation schedules without the approval of their district managers. Based on the reasoning and conclusions in Twenty-First Century and Gray, a single store unit in the present case is highly inappropriate and legally unsupportable.

From the evidence as to the duties and powers of the manager of an Alberts store, it can be seen that he lacks the authority to make substantive decisions on any issue which would be a subject of collective bargaining. In the Alberts operation, all authority to decide such issues for the Detroit metropolitan area stores is concentrated in the central office in Ferndale. Therefore, the smallest appropriate unit in the Alberts system would be one covering all twenty-four metropolitan Detroit area stores, and a unit consisting of only one of those stores is clearly inappropriate.

A unit determination can only be sustained if it is neither arbitrary nor capricious. Packard Motor Car v. NLRB, 330 US 485 (1947). As evidenced by the number of cases discussed herein, a finding of arbitrariness is not uncommon. In this case, the Board acted arbitrarily and capriciously in its failure to follow its own precedent, its failure to follow the precedent of the courts, and its failure to recognize the disruptive effect of single store units in a centralized chain. The D.C. Circuit's failure to reverse the Board's arbitrary decision results in a conflict among the circuits as to unit appropriateness, a conflict which destroys the uniformity of principles necessary for the stability of labor relations throughout the country. The determination of whether a retail chain must bargain on a single or multi-store basis cannnot be based upon the circuit in which that chain is located.

Since the union claimed to represent employees in an inappropriate unit, the management of Alberts was not under an obligation to bargain with the union, and the

charges of failure to bargain in violation of Section 8(a)(5) should have been dismissed. The D.C. Circuit's failure to dismiss the charges presents a clear basis for the Supreme Court's review on this issue.

B. Alberts No-Solicitation Rule is Not Discriminatory in its Promulgation or Application and is Identical to Other Such Rules Declared Valid.

In order to maintain efficient operations during the pendency of union campaigns, it is common for employers to institute "no solicitation" rules which limit the extent of union activities (either pro or con) in which employees may engage. Within certain limits such rules have been determined by the Board and courts to be lawful. The basic approach in cases where the validity of a particular rule is in question has been for the decision-making authority to balance the need of the employer to maintain efficiency and decorum against the restriction placed upon activities of the employees. In the field of retail enterprise an employer is granted more latitude in restricting employees' activities than are employers in other types of endeavor. The D.C. Circuit in this case affirmed the Board decision which used a very mechanical, formalistic approach in considering the rule and was therefore inconsistent with both the spirit and the letter of the applicable decisions of both the Board itself and the circuit courts.

The reason for the special rule in this area applicable to retail operations is easy enough for us to understand; the well-being of the company's business is directly related to its maintenance of customer goodwill. Further, the customers in the retail industry are personally present at the employer's premises; therefore, the conduct of the employees and their decorum while at work are very real and legitimate concerns of the employer. Accordingly, it has been well established through both Board and court decisions that a retail employer may completely prohibit solicitation in sales areas and may prohibit solicitation at all times if it interferes with selling activities. Food Store Employees Union, Local 347, Amalgamated Meat Cutters, Etc. v. NLRB, 418 F2d 1177, 1180 (D.C. Cir. 1969); Montgomery

Ward & Co. v. NLRB, 157 F2d 486 (CA 8, 1946); May Department Stores Co. v NLRB, 154 F2d 533, 537 (CA 8, 1946) Cert. denied 329 US 725.

Here, however, the Board and the D.C. Circuit erred in that they refused to view the rule in question in the way employees would view it. That is, they refused to apply a common sense, everyday approach to the meaning of the rule. Instead, the Board analyzed the rule by splitting it into various small components and finding fault with each component. The Board truly engaged in an exercise of "not seeing the forest for the trees."

Specifically, the Board in its holding on this point reached two separate conclusions each of which constitutes error of law. The first conclusion was that a prohibition of solicitation during "working hours" is invalid on its face (App. 3-5). Second, the Board concluded that despite the clarifying statement in the printed rule that the prohibition against solicitation was intended to avoid interruptions of "normal work" the reference to no solicitation on "company property" was overbroad even for a retail store. The Board, instead of reading the no-solicitation rule in its entirety to determine its real meaning, took two phrases out of context and classified the rule in neatly established categories. Thus, the Board labeled Alberts' no-solicitation rule as invalid despite the fact that its clear import is such as has been found acceptable in retail businesses.

The Board's decision (which became the decision of the D.C. Circuit without elucidation) relied upon the decision in Essex International, Inc., 211 NLRB No. 112 (1974) as a basis for its conclusion that the Alberts' no-solicitation rule is presumptively invalid. In the Essex case the Board announced a distinction between prohibitions of solicitation during "working hours" and those during "working time". The Board held that "working time" prohibitions referred to time on the floor while "working hours" referred to all time on the premises including rest and lunch periods. Despite the Board's persistence in perpetuating this meaningless

distinction, the courts prior to the D.C. Circuit herein have never supported the distinction.

In Republic Aviation Corp. v. NLRB, 324 US 793 (1945), the Supreme Court stated unequivocally that the prohibitions against solicitations during "working hours" are not presumptively invalid. The Court said at page 803:

> It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. (emphasis added)

Similarly, the D.C. Circuit, in United Steel Workers of America v. NLRB, 393 F2d 661 (D.C. Cir. 1968) stated at page 663:

> As to the notice, it is of course the province of the employer to prohibit union solicitation on company premises during "working hours". (emphasis added)

In NLRB v. F. W. Woolworth, 214 F2d 78 (CA 6, 1954), the concurring opinion of Judge Miller recognized that:

> Neither the Constitution, the common law, nor the Labor Management Relations Act confers upon employees the right to use for union purposes the property of their employer during working hours, over the objections of the employer. 147 F2d 85 (emphasis added)

Woolworth was cited with approval in NLRB v. United Steel Workers of America, 357 US 357, 364 (1958), and in TRW, Inc., TRW Michigan Division v. NLRB, 393 F2d 771, 772 (CA 6, 1968).

Other cases have also declined to make the working hours-working time distinction upon which the Board's decision is based in this case. NLRB v. WKRG-TV, Inc., 470 F2d 1302 (CA 5, 1973); NLRB v. Essex Wire Corp.,

245 F2d 589, 593 (CA 9, 1957); Bonwit Teller, Inc. v. NLRB, 197 F2d 640, 645 (CA 2), Cert. denied, 345 US 905 (1952); Olin Industries, Inc. v. NLRB, 191 F2d 613, 617 (CA 5), Cert. denied, 343 US 919 (1951); NLRB v. Montgomery Ward & Co., 157 F2d 486, 494 (CA 8 1946); NLRB v. May Dept. Stores Co., 154 F2d 533, 538 (CA 8) Cert. denied, 329 US 725 (1946); NLRB v. Edinburg Citrus Ass'n., 147 F2d 353, 356 (CA 5, 1945); NLRB v. William Davies Co., 135 F2d 179, 182 (CA 7), Cert. denied, 320 US 770 (1943).

The Board in this case relied upon a single court decision [Int'l Union of Electrical Workers v. NLRB, 434 F2d 473 (D.C. Cir., 1970)] in support of the working hours-working time distinction suggested in Essex International, supra. The Board's reference to that case was both misleading and erroneous as the court in Int'l Union of Electrical Workers, supra, did not give credence to the distinction the Board suggested; that decision stands solely for the proposition that a rule prohibiting solicitation during "working time" is valid. There was no mention of the term "working hours." Prior to the decision in this case no court had ever adopted the Board's tenuous distinction. Employers, employees and unions alike must have some degree of certainty with respect to the validity of any form of work rules. The distinction sought by the Board in this case is so subtle that by necessity uncertainty is created and inequity promoted.

The determination that Alberts' rule is invalid per se is also based upon the conclusion that its applicability to "company property" is too broad. There is no basis for a finding that a rule is invalid because of the reference to "company property". Again, the Board applies its "catch-phrase" approach, entirely overlooking reality. The no-solicitation rule, as acknowledged by the Board, clearly states that the purpose of the rule is to avoid interruption of "normal work". Since work can, by definition, only be conducted in working areas, the intent of the rule is clear: there can be no solicitation in work areas while the store is open for business. This clearly constitutes a permissible, non-discriminatory rule. The fact that there was no evidence offered of enforcement of the rule in non-work areas and there was no evidence

offered that any employee was confused by the rule demonstrates that everyone understood the purpose behind the rule: avoid disrupting the selling operations in Alberts stores.

Certainly, if this Court were to unreasonably extract the sentence "during working hours on company property," without considering the rule in its entirety, it too could conclude as the Board and apparently the D.C. Circuit did that the rule prohibits solicitation in non-work areas. If, however, the entire rule is read, particularly the passage stating that employees may discuss the union as long as "their discussions do not interrupt their normal work", it is clear that the prohibition is limited to work areas of the store. Such a prohibition is presumptively valid.

Once it is determined that the no-solicitation rule is presumptively valid, the 8(a)(1) charge must be dismissed as there is no evidence that the rule was promulgated for a discriminatory purpose or applied in a discriminatory manner. The only instance in which the rule was enforced was initiated by an employee whose selling activity was disrupted by another employee soliciting a union authorization card. This is exactly the type of activity which Alberts sought to prohibit and which the Board and courts have held is justifiably prohibited.

Alberts promulgated the no-solicitation rule because prior experience indicated that union organization can cause business disruption (App. 46, 47). There is no evidence that Alberts tried to hinder organizational activity. In fact, such activity was so successful that in the only election held to date (Universal store) the union won by a 17-5 margin. Obviously, the union was not in any way stymied in its efforts to get its message across.

When one examines this rule in its entirety, with an eye to its actual meaning to store employees, one must conclude that the rule does indeed properly strike that balance between the employer's interests and the union's. This is the type of rule which should be upheld rather than labeled "presumptively invalid". The scope of the rule is clear, the law is clear and the resultant conclusion

is clear: the no-solicitation rule is valid on its face. The D.C. Circuit's refusal to recognize the validity of the rule is contrary to every other circuit court decision and creates an issue for which Supreme Court review is both appropriate and essential to the field of labor relations.

CONCLUSION

The appropriateness of a collective bargaining unit is a critical issue in labor relations law. The circuit courts have consistently held that a single store unit is inappropriate in a chain where operations and labor relations are centrally handled. It is particularly inappropriate where, as here, we are dealing with a single metropolitan area. In the present case the D.C. Circuit departed from this well-established principle and created a distinct split among the circuits. The creation of the split leads to the unacceptable result that unit decisions will no longer be consistent and will depend entirely upon the circuit that hears the case.

The D.C. Circuit further erred in its adoption of a standard for "no-solicitation" rules which has been universally rejected by the courts of this country. Employers and employees must have a degree of certainty as to permissible conduct during a union campaign in a retail setting. The newly created split of the circuits results in ambiguity which can only lead to chaotic labor relations, a situation which the Supreme Court has long sought to eliminate.

The two issues in this case are of national significance to the law of labor relations. The D.C. Circuit has created these critical issues by deviating from the overwhelming majority views of the other circuits. For this reason, we request that the Supreme Court grant a writ of certiorari to review the two issues raised in this petition.

Respectfully submitted,

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DATED: December 10, 1976

Supreme Court, U.S.
FILED
DEC 13 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1976

No. 76-7991

NATIONAL LABOR RELATIONS BOARD,

Respondent

-vs-

ALBERTS, INC., and DETROIT SHOE COMPANY,

Petitioner

RETAIL AND DEPARTMENT STORE EMPLOYEES, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Intervenor

/

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

_____ [No Opinion]

NO. 75-1361 SEPTEMBER TERM, 1976

Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO, Petitioner

v.

National Labor Relations Board, Respondent

Albert's, Inc., Intervenor

NO. 75-1499

National Labor Relations Board, Petitioner

v.

Albert's, Inc. and Detroit Shoe Company, Respondents

Retail and Department Store Employees, Etc., Intervenor

Petition to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Before: Bazelon, Chief Judge, and Wright and Robinson, Circuit Judges.

ORDER

These causes came on to be heard on a petition to review and a cross-application to enforce an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. See Local Rule 13(c).

There is substantial evidence in the record to support, and a rational basis for, the Board's order sought to be reviewed herein.

On consideration of the foregoing, it is Ordered by this court that the petition for review is hereby denied, and the cross-application to enforce is hereby granted.

Per Curiam

For the Court

/s/ George A. Fisher/by DMC
George A. Fisher
Clerk

213 NLRB No. 94 D-9122
Detroit, Michigan

UNITED STATES OF AMERICA
Before the National Labor Relations Board

Alberts, Inc.
and
Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO

Case 7-CA-10399

Alberts, Inc., and Detroit Shoe Company,
and
Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO

Cases 7-CA-10384
7-CA-10411
7-CA-10439
7-CA-10489
7-CA-10563
7-CA-10625

Decision and Order

On March 29, 1974, Administrative Law Judge Arnold Ordman issued the attached Decision in this proceeding. Thereafter, Respondents and the Charging Party filed exceptions and supporting briefs, and Respondents filed a brief in answer to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,

findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We find, in agreement with the Administrative Law Judge, that the no-solicitation rule promulgated by Respondent Alberts in February 1973 was adopted for a discriminatory purpose. However, we disagree with his preliminary finding that the rule is presumptively valid on its face, inasmuch as, in our view, the rule fails to clearly and unambiguously convey to employees the valid restrictions on their organizing activities.

[1]The Respondents and Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[2]We agree with the Administrative Law Judge that the promise by agents of the Union that initiation fees would be waived if the Union became bargaining representative did not taint the results of the election conducted at the Universal Mall store on May 10, 1973. See Irwindale Division, Lau Industries, a Division of Phillips Industries, Inc., 210 NLRB No. 42 (1974)

The rule provides:

> During the time that the union is trying to organize the employees, the company will expect employees to render their usual good service to the company and union organizers will not be allowed to discuss the union during working hours on company property. Employees who desire to discuss the union between themselves may do so during non-working hours, making sure that their discussions do not interrupt their normal work.

As written, the rule contains inherent ambiguities. First, it fails to specify whether the term "union organizers" refers to employee organizers or only to nonemployees. A prohibition against union solicitation by employees "during working hours on company property" is clearly unlawful.[3] Accordingly, as the term "union organizers" could be construed to encompass employees who engage in union organizing activity, we find this portion of the rule to be ambiguous and, therefore, invalid.

The last sentence of the rule is also confusing. While rules which prohibit solicitation during "working hours", as this rule apparently does, are generally presumptively invalid,[4] an excep-

[3]Pepsi-Cola Bottling Co. of Los Angeles, 211 NLRB No. 132 (1974).

[4]Essex International, Inc., 211 NLRB No. 112 (1974). Members Fanning and Jenkins, while dissenting in Essex, agreed with the majority that the term "working hours" is ambiguous and that a rule utilizing that term is presumptively invalid.

tion to this policy is made in the case of retail establishments, which, because of the nature of their business, may prohibit solicitation, even during break and lunch periods, on the selling floor.[5] The instant ban on union solicitation, however, is not limited to the selling floor or to other public areas of the store and therefore, in our view, renders the rule invalid on its face.

Respondents except, inter alia, to the scope of the Administrative Law Judge's recommended posting provision. Although the Administrative Law Judge found that Respondents committed violations of Section 8(a)(1) and (3) of the Act at three stores, he recommended that Respondents be required to post a notice at each of their stores in the Greater Detroit metropolitan area. Under the circumstances, we believe the posting of the notice should be limited to those stores where unfair labor practices occurred. United Mercantile Incorporated; United Mercantile, Inc., No. 2; and United Mercantile, Inc., No. 3; d/b/a Globe Shopping City, 204 NLRB No. 109 (1973).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders

[5]Montgomery Ward & Co., Inc., 145 NLRB 846 (1964), modified in other respects 339 F.2d 889 (C.A. 6, 1965).

that Respondents, Alberts, Inc. and Detroit Shoe Company, Detroit, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following sentence for the first sentence in paragraph 2(a):

"(a) Post at its Lincoln Park, Northland and Universal Mall stores copies of the attached notice marked 'Appendix.' "

Dated, Washington, D.C. Sep 27 1974

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) National Labor Relations Board

UNITED STATES OF AMERICA
Before the National Labor Relations Board

Alberts, Inc. and Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO	Case 7-CA-10399
Alberts, Inc., and Detroit Shoe Company, and Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO	Cases 7-CA-10384 7-CA-10411 7-CA-10439 7-CA-10489 7-CA-10563 7-CA-10525

Order Correcting Decision and Order

On September 27, 1974, the National Labor Relations Board issued a Decision and Order in the above-captioned case[1] finding that Respondent had violated Section 8(a)(1), (3) and (5) of the Act. Thereafter, on October 21, 1974, the Charging Party filed a Motion for Clarification and/or Reconsideration. Respondent filed a statement in opposition to said Motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] 213 NLRB No. 94

The Board, having duly considered the Charging Party's Motion, Respondent's statement in opposition thereto, and the entire record herein, makes the following findings:

We agree with Respondent's contention that the motion was untimely filed as a motion for reconsideration under Section 102.48(d) of the Board's Rules and Regulations, Series 8, as amended. However, we find that the motion was timely filed as a request to correct an obvious error in the Board's Decision and Order and we shall consider and treat it as such.

We find merit in Charging Party's contention that the Board erred in ordering Respondent to post the Notice to Employees at only three of Respondent's stores in the Greater Detroit metropolitan area. Since Respondent's no-solicitation rule, which the Board found violative of Section 8(a)(1) of the Act, was promulgated, distributed, and explained to the employees at all of Respondent's stores in the Greater Detroit metropolitan area, the Notice to Employees properly must be posted at all such stores, as the Administrative Law Judge had recommended in his Decision, rather than at only three such stores, as the Board had ordered.

Accordingly, the Board hereby corrects its Decision and Order[2] by deleting therefrom the paragraph immediately preceding the paragraph entitled "Order," and by substituting the following paragraph in place of the paragraph appearing thereunder:

[2] The Decision and Order will appear in the published NLRB volume of 213 as corrected herein.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that Respondents, Alberts, Inc., and Detroit Shoe Company, Detroit, Michigan, their officers, agents, successors, and assigns shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., December 19, 1974.

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) National Labor Relations Board

Regional Director's Decision and
Order of Election
7-RC-11789

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Seventh Region

Alberts, Inc.
Employer
and Case No. 7-RC-11789
Retail and Department Store
Employees, Amalgamated
Clothing Workers of America,
AFL-CIO
Petitioner

A. David Mikesell, Esq., of Detroit, Michigan, and Robert Radner, Esq., of Southfield, Michigan, for the Employer.
Bernard J. Firestone, Esq., and Hiram S. Grossman, Esq., of Detroit, Michigan, for the Petitioner

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before B. Allan Benson, Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Sections 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record[1] in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c)(1) and Section 2(6) and (7) of the Act.

4. Alberts, Inc., a Delaware corporation, is engaged in the retail sale of women's clothing. The Employer has 48 stores in Michigan, Ohio and Illinois, 24 of which are located in what is referred to as the Detroit metropolitan area. Of these 48 stores, there are six in what is called the Alcove Division, which is a wholly-owned subsidiary of Alberts, Inc. sharing common officers with its parent corporation. Four of the 24 Detroit metropolitan area stores are within the Alcove Division. In approximately 15 of the 48 total stores and seven of the 24 Detroit metropolitan area stores, but not including the one petitioned for, the Employer maintains a lease arrangement with the Detroit Shoe Company.

The parties are in general agreement that the composition of any appropriate unit should

[1]The Employer and the Petitioner have filed timely briefs which have been duly considered.

include all full-time and regular part-time selling and non-selling employees. The dispute is to the scope of the unit. The Petitioner seeks to represent the employees in a one-location unit, limited to the Employer's General Motors Building store in Detroit, Michigan, at which approximately six employees are employed. Taking a contrary position, the Employer asserts that a unit limited to the General Motors Building store is inappropriate and that the only appropriate unit would be one composed of all 24 of its stores located in the Detroit metropolitan area, at which approximately 470 employees are employed.

The parties stipulated and agreed to incorporate in the instant record the testimony given by William B. Klinsky in Case No. 7-RC-11675 with respect to the Universal City Shopping Center store, involving the same parties, with the provision that any testimony dealing specifically with said store would not be applicable to the facts pertaining to the General Motors Building store.

There is no history of collective bargaining with respect to the employees at the General Motors Building store, nor does any labor organization seek to represent any of the employees involved herein in a unit different from that sought herein by the Petitioner. The Petitioner was certified on July 2, 1973, with respect to the employees at the Universal City Shopping Center store.

As is common in retail chain operations, there is a high degree of centralized administration in the functioning of the Employer's facilities. The Employer's central office in Ferndale, Michigan, services all stores.

Each store is headed by a manager and either one or two assistant managers depending on its size. The General Motors Building store has only one assistant manager. In addition to the store manager, each store is superintended on an overall basis by a line supervisor who reports directly to the Employer's president; there are four line supervisors who maintain superintending control over the Detroit metropolitan area stores. The vast majority of the line supervisors' time is spent travelling from store to store, each visiting the respective stores within their jurisdiction about once a week. The line supervisors oversee the mechanical operations of the stores, including exterior condition and store arrangements, are responsible for the performance of the managers and assistant managers, observe the performance of individual employees, oversee that each store's payrolls are kept within guidelines established by the main office, review the weekly schedule of hours prepared by each of the managers, and change the employee complement when the volume of business so necessitates. A director of personnel, recently appointed, is in charge of labor relations matters, including administration of a wage and benefits program, for virtually all of the Employer's stores. There is a director of security for all stores whose functions include verifying the truthfulness of employee applications and enforcing security guidelines. The latter job duty brings him in contact with employees in all stores. There is one supervisor who trains, promotes, and transfers all cashiers. The Employer also employes an outside service organization which sends "shoppers" into the various stores for purposes of evaluating employees based upon instructions given to them by the security director.

The total employment complement for each store is determined centrally, according to each location's volume of business. The total number of work hours for each installation during any period is likewise determined centrally. Pay scales, employee benefits, and vacation periods are uniform for all stores. Payroll functions are carried out at the Employer's central office in Ferndale, Michigan. Store hours are uniform, except where lease obligations require the Employer to adhere to the hours of a particular shopping center. All stores are closed for the same holidays. The merchandise sold at all stores is essentially the same, is ordered centrally by the main office and shipped to the individual stores from the central distribution center in Ferndale, Michigan. In addition, merchandise is transferred between stores as the need arises or for liquidation sales. The Employer employs buyers who work out of the main office and who visit the stores to, among other things, observe inventory levels and discuss with the employees their selling experiences. Employees of the same departments from all the stores meet as a group once a year primarily to discuss merchandising in their respective areas. The Employer also has a sales incentive program, which operates by departments on a multi-store basis. Finally, advertising is prepared by an advertising director housed in the main office in Ferndale. The vast majority of the Employer's advertising budget is spent on area-wide advertising in "The Detroit News" and "Detroit Free Press", the principal area newspapers. However, the record indicates that advertisements are placed solely for the General Motors Building store in

a publication circulated only in its neighboring business area.

Each of the Employer's 48 stores is under the direct supervision of a store manager, who is responsible for its day-to-day operation. The authority of the various managers appears to be directly related to the size of their respective stores with managers of the larger stores clothed with more authority. Thus, managers in the larger stores interview applicants, hire employees without consulting their line supervisor, have discretion in setting starting pay rates, can grant merit increases on their own initiative, establish work schedules, determine which employees will have their hours reduced as well as which employees will be laid off in the event that such actions are found necessary, determine which employees will be recalled, establish vacation schedules and finally, reprimand, discipline and discharge employees on their own.

The General Motors Building store is one of the Employer's smaller stores and, as a consequence, its manager, Kay Marmon, does not possess the degree of authority of managers of larger stores. However, her responsibilities are by no means insubstantial. While her line supervisor, Irving Brandt, visits the General Motors store usually once a week for about three or four hours and speaks to her on the telephone on the average of once a day, it is Marmon who has direct and immediate supervision over the store's employees. She is responsible for the store's day-to-day operations; and she is the person to whom the employees must, at least initially, look with respect to matters relating to their employment. Marmon interviews

job applicants and after screening the applications, she transmits to Brandt, with her recommendations, only those applications of individuals she would consider hiring. While there is testimony that with respect to the General Motors Building store it is the line supervisor who does the actual hiring and then only after the director of security has verified the application, it also appears from the record that this practice is not always followed and that Marmon has in fact hired employees without seeking Brandt's prior approval and before obtaining security clearance. In addition, when the applications are sent to Brandt, he relies solely on the information provided by Marmon in making his decision and he appears to routinely accept her recommendation as to hiring, pending clearance by the security officer. Due to the fact that the General Motors Building store is open only from 9:00 a.m. to 5:30 p.m., Monday through Friday, there is only one work shift. However, Marmon does get involved in determining the work hours of part-time employees. When temporary transfers are necessary, the line supervisors, after deciding from which stores the employees will come, will inform the various store managers of the number of their employees that are needed, and thereupon it is usually the respective store managers, including Marmon, who will decide which employees will be transferred. While it is Brandt who grants pay increases at the General Motors Building store, Marmon's opinion is sought before a decision is made. When layoffs are necessary, the usual procedure is for the least senior employee to be laid off. However, the managers, based upon their individual determinations as to the competency of their em-

ployees, can recommend that others than the least senior employees be laid off. The employees at the General Motors Building store take their various complaints to Marmon, who, in her discretion, can act on them without consulting Brandt. Marmon disciplines employees as evidenced by her handling of an incident concerning an employee in which she ordered the employee off the floor for misbehavior. Finally, although it is not clear whether it was in fact Marmon who terminated the above-referred to employee, she in effect recommended such action be taken and was supported apparently without question.

With respect to interchange of employees among the Detroit metropolitan area stores, the Employer submitted exhibits listing the names of those employees either temporarily or permanently transferred among the Detroit metropolitan area stores since April 1971, as well as weekly payroll time sheets from all 24 stores for the period from April 1971 through March 1973. The Employer's third exhibit indicates that 13 employees were temporarily transferred in the first quarter of 1973. Of this last number, one employee's transfer, Nancy Gruenstein, was listed twice; another employee, Andy Winer, whose name appears twice, is an assistant manager; two employees, D. Minasian and J. Renard, are listed twice each, one transfer indicating a move from Albert's Boutique to Alcove Birmingham and the second showing a move back to the Boutique. Since Employer's Exhibit Number 5 indicates that these two employees are regularly employed at the Boutique store, their return to this store is not, in the opinion of the under-

signed, a true reflection of a temporary transfer. In addition, the record indicates that M. Iaco, whose name also appears as Iocco was permanently transferred on January 6, 1973 from the Northland store to the Dequindre store and also temporarily transferred on January 13, 1973 from Northland to Dequindre. Inspection of Employer's Exhibit Number 5 fails to reveal this temporary transfer, which in any event, appears to be incongruous with the prior permanent transfer from and to the same store. Thus, of the 13 temporary transfers listed for the first quarter of 1973, there were in fact only eight transfers of non-managerial employees, none of which involved the General Motors Building store.

The average number of hours worked by transferred employees while away from their regular store was less than eight and one half, which number of hours the Employer indicated represents less than one day's work. As indicated in the record in the previous case, employees who are temporarily transferred continue to be paid by the store at which they are regularly stationed. When an employee works for consecutive weeks at a store other than his regular one, the Employer counts the transfer in each such week as a separate one. The time sheets (Employer Exhibit Number 5) from which Employer Exhibit Number 3 was fashioned do not indicate whether the days worked were consecutive, such as Friday of one week and Monday of the next, which, if that were the case, would not constitute, in the opinion of the undersigned, two different transfers. Testimony in the record indicates, however, that the Employer would count such occurrences as two transfers. Due to the factors above, it is difficult to determine

the exact number of temporary transfers that occurred during 1972. There were approximately 110 temporary transfers of non-managerial, unit employees during this period. This figure also appears possibly to be overstated as evidenced by the fact that employee N. Battisti is listed five times for five consecutive weeks, at least some of which weeks she worked solely at the John R. store. Employee E. Stillman is listed four times for four consecutive weeks. Also included on the list are warehouse and office employees which are outside the job classifications involved herein. Roughly one half of the total number of 1972 temporary transfers were of eight hours or less and only one such transfer concerned the General Motors Building store.

Six employees were permanently transferred to other locations in the last three quarters of 1971, 25 in 1972 and 12 in the first four months of 1973. Of these last 12, four were transferred when the Miracle Mile store closed and one employee Sue Gillis (also appearing on the list under the spelling of Susan Gilles) was transferred again one month later. Of the permanent transfers, only one in 1972, involved the General Motors Building store. At the end of April 1971, 1972 and 1973, respectively the total employment complement at the Detroit area stores consisted of approximately 410, 330, and 470 employees.

While there are factors present here which would support a finding that an area-wide unit may be appropriate, they are not of sufficient weight, considering the record as a whole, to negate the appropriateness of a narrower unit. McCoy Co., 151 NLRB 333; Montgomery Ward & Co., Incorporated, 150 NLRB 598; Sav-On Drugs, Inc., 138 NLRB 1032.

As indicated in the Decision and Direction of Election in 7-RC-11675, the individual store managers are clothed with substantial autonomy in supervising and controlling the daily operations of their respective stores, and that the centralized activities of the Employer do not have such a widespread impact as to submerge the commonality of the interests and conditions of employment of the employees at any of the individual stores, who form a cohesive and independent grouping of employees. While there is testimony in the present record to indicate that not all the stores managers have the same degrees of authority, testimony does not indicate that it is the exception rather than the rule for store managers to possess a high degree of autonomy. This factor is of major importance in determining scope of unit issues. Since a larger unit is claimed to be the only one appropriate, it is necessary to examine that overall unit and the characteristics of all the stores within the unit rather than just the single General Motors Building store. Employees in the larger stores perform their duties under the immediate supervision of the local store managers who hire them, set their wage rates, may discipline or discharge them, and who personally and effectively are involved in the daily determinations of personnel matters, such as setting of work hours, temporary transfers, vacations, and other terms and conditions of employment. There is geographic separation of the stores. Though Marmon's authority is not this broad, she does play an important role in determining which employees will be hired and fired and she also is responsible for the day-to-day operations of and employee functionings at the General Motors Building

store. While the line supervisors have ultimate control over certain matters in the various stores, there are four different supervisors responsible for a varying number of Detroit metropolitan area stores and, thus, the ultimate supervision is dissimiliar. The number of temporary transfers, while a factor to be considered, is not sufficiently extensive to mitigate a finding that a single store unit is appropriate, especially in light of the fact that such transfers are primarily on a voluntary basis, are for short periods of time and that the transferred employees continue to be paid from their "home" store. Finally, the number of permanent transfers are small in context of the large employee complement and have involved the General Motors Building store only once in the past two years.

Based upon the above, and the record as a whole, I find that the single store unit sought herein is appropriate for the purposes of collective bargaining.[2] Neisner Bros., 200 NLRB No. 137; Big N Department Store No. 333, 199 NLRB No. 28; Angeli's Super Valu, 197 NLRB No. 22; Angelus Furniture Manufacturing Co.,

[2]It is again noted that on April 10, 1973 in Case No. 7-RC-11675, the undersigned concluded that the Employer's Universal City Shopping Center store constituted an appropriate bargaining unit. Request for Review was filed and on May 1, 1973, the Board denied such Request for Review.

192 NLRB No. 137; Haag Drug Co., 169 NLRB 877; Cf. Food Marts, Inc., 200 NLRB No. 5; Gray Drug Stores, Inc., 197 NLRB No. 105; Twenty-First Century Restaurant of Nostrand Avenue Corp., Licensee of McDonald's Corporation, 192 NLRB No. 103. Upon consideration of the entire record, I find that the factual configuration with regard to the unit determination herein is materially different from the facts of Gray Drug Stores, supra and Twenty-First Century-Nostrand, supra, cited by the Employer in its brief in support of its contention that a single store unit would be inappropriate.

For the reasons explicated above, I find the following unit to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I shall direct an election therein:

All full-time and regular part-time selling and non-selling employees[3]

[3]There is a question as to the status of Gloria Hittle who is referred to as either a department head or assistant manager. While Hittle has taken over for Marmon when the latter was on vacation, during which time Brandt visited the store more frequently than usual, a replacement is being brought into the store when Marmon will be off for an anticipated medical absence. Hittle does receive approximately a twenty per cent higher salary than the other sales employees, but punches a time clock as they do. Hittle receives a higher discount on her own purchases than do the other employees. In addition to engaging in selling, Hittle also handles customer complaints and cashiering duties. However, there is no in-

employed by the Employer at its General Motors Building store; but excluding professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[4] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who

[3](continued) dication in the record that other than replacing Marmon when the latter took a vacation, did Hittle engage in any supervisory functions over the employees in the General Motors Building store. Based upon the above and the record as a whole, I find that Hittle's engaging in supervisory duties is sporadic and that she is not a supervisor within the Act's meaning.

[4]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington, D.C. by July 30, 1973.

retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[5] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO.

Dated at Detroit, Michigan, this 17th day of July, 1973.

/s/ Bernard Gottfried

(SEAL)

Bernard Gottfried, Regional Director
National Labor Relations Board
Seventh Region
500 Book Building
1249 Washington Boulevard
Detroit, Michigan 48226

[5]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236; NLRB v.

[5](continued) Wyman-Gordon Company, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list, two copies of which are requested, available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, on or before July 24, 1973. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Seventh Region

Alberts, Inc., Detroit Shoe Company[1]

Employer

and

Case No. 7-RC-11675

Local 876, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO

Petitioner

Marvin Breskin, Esq., of Detroit, Michigan, and Robert Radner, Esq., of Southfield, Michigan, for the Employer.

Bernard J. Firestone, Esq., and Hiram Grossman, Esq., of Detroit, Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was

[1]The name of the Employer is set forth as it was amended at the hearing. Detroit Shoe Company is a lessee at various Alberts, Inc. stores. Although it was not served with the Notice of Hearing, the attorney for Alberts, Inc. entered an appearance for Detroit Shoe Company and represented it in the proceedings. The parties agreed that any election directed should include employees of Detroit Shoe Company.

held before Frances B. Rohlman, Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Sections 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c)(1) and Section 2(6) and (7) of the Act.

4. Alberts, Inc., a Delaware corporation, is engaged in the retail sale of women's clothing. Detroit Shoe Company, a Michigan corporation, is engaged in the retail sale of women's shoes at various Alberts, Inc. stores, including the petitioned-for Universal City Shopping Center store in Warren, Michigan. The parties, although in dispute as to the geographic scope of the unit, have stipulated that a unit encompassing all full-time and regular part-time selling and non-selling employees employed by the Employer, including employees of Detroit Shoe Company; but excluding professional employees, guards and supervisors as defined in the Act, would con-

stitute an appropriate unit for the purposes of collective bargaining.[2]

Petitioner seeks to represent the foregoing unit constituents in a one-location unit limited to the Employer's Universal City Shopping Center store in Warren, Michigan, at which approximately 25 employees are employed. Taking a contrary position, the Employer asserts that a unit limited to but one of its stores is inappropriate and that the only appropriate unit would be one composed of all 24 of its installations located in the Detroit metropolitan area.

There is no history of collective bargaining as to any of the above-mentioned stores, nor does any labor organization seek to represent any of the employees involved herein in a unit different from that sought herein by the Petitioner.

As is common in retail chain operations, there is a high degree of centralized administration in the functioning of the Employer's facilities. The Employer's central office in Ferndale, Michigan, services all stores.

Each individual store has a manager and two assistant managers. In addition, each store is superintended by a line supervisor who reports directly to the Employer's president. There are two line supervisors in the Detroit metropolitan area, each of whom is responsible for

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[2]The parties further stipulated that warehousemen and general office clerical employees at the Employer's central office located in Ferndale, Michigan should be excluded from any unit found to be appropriate.

roughly one half of the stores located in that area. The vast majority of the line supervisors' time is spent traveling from store to store, each visiting the respective stores within their jurisdiction on the average of once a week. The functions of the line supervisors include overseeing the mechanical operations of the stores, including examination of the exterior conditions, cleanliness and store arrangements. In addition, the line supervisors are responsible for the performances of the managers and assistant managers. They also observe the performances of individual employees, oversee that store payrolls are kept within the guidelines established by the main office, and review the weekly schedule of hours prepared by each of the managers of the stores under their superintendence.

The total employment complement for each store is determined centrally, according to each location's volume of business. Pay scales, employee benefits, and vacation periods are uniform for all stores. Payroll functions are carried out at the Employer's central office in Ferndale, Michigan. The total number of work hours for each installation during any period is likewise determined centrally. Store hours are uniform, except where lease obligations require the Employer to adhere to the hours of a particular shopping center. All stores are closed for the same holidays. The merchandise sold at all stores is essentially the same, is ordered centrally by the main office and shipped to the individual stores from the central distribution center in Ferndale, Michigan. Advertising is prepared by an advertising director housed in the main office in Ferndale. The vast majority of the Employer's advertising budget is spent

on area wide advertising in "The Detroit News" and "Detroit Free Press".

The record establishes that 49 employees were permanently transferred from one store to another during the period from January 1972 unitl mid-March 1973. Of this number, however, only 15 non-managerial employees, or 3.5% of the approximately 425 potential overall unit employee complement were transferred between Detroit metropolitan area stores. With regard to temporary transfers, employees are interchanged whenever a need arises for a larger group of employees in an individual store, such as for a grand opening or a special event. Such transfers occur between 25 to 30 times a year. When additional employees are needed at a particular store, a line supervisor will contact a store manager and request a certain number of employees. The individual store managers select the employees who are to be temporarily transferred. Employees who are temporarily transferred continue to be paid from the store in which they are permanently employed and the latter store is charged for that employee's time.

Each store is under the direct supervision of the store manager who is responsible for its day-to-day operation. The store managers do their own interviewing and hiring of employees. It is the store manager's function to alert the central office of insufficiency in the employment staffing for the store. However, with respect to seasonal employees, the managers can hire these without first notifying the central office. The store managers have discretion in setting starting pay rates and consult with the line supervisor only when they wish to hire an em-

ployee at a rate in excess of that set out in the company policy. In addition, store managers can grant merit increases without first seeking approval from the line supervisors. While the number of employees for each store is centrally determined, the store managers establish the weekly schedules of hours according to what they feel are the needs of their respective stores. Alteration of work schedules and days off is effectuated directly by the store managers. They will determine as to which employees will have their hours reduced as well as to which employees will be laid off in the event that such actions are found necessary. Likewise, the store managers will decide as to which employees will be recalled. Vacation schedules are established by the store managers within the specific months allocated centrally. When temporary transfers are necessary, the line supervisors will inform the various store managers of the number of employees that are needed, but it is the respective store managers who will decide which employees will be transferred. Finally, store managers can reprimand, discipline and discharge employees on their own.

Although the foregoing recitation may support a finding that an area-wide unit may be appropriate, the undersigned finds that the appropriateness of such a unit does not under the factual circumstances found herein negate the appropriateness of a narrower unit. McCoy Co., 151 NLRB 383; Montgomery Ward & Co., Incorporated, 150 NLRB 598; Sav-On Drugs, Inc., 138 NLRB 1032.

On the basis of the record, it is clear that individual store managers are clothed with substantial autonomy in supervising and control-

ling the daily operations of their respective stores and that the centralized activities of the Employer do not have a substantial relationship to the interests and conditions of employment of the employees at any of the individual stores, who form a cohesive and independent grouping of employees.

The employees perform their day-to-day duties under the immediate supervision of the local store managers who hire them, set their wage rates, may discipline or discharge them, and who personally and effectively are involved in the daily determinations of personnel matters, such as setting of work hours, temporary transfers, vacations, and other terms and conditions of employment. There is geographic separation of the stores. Permanent transfers between the stores is of a limited degree and lacks sufficient significance to militate against finding a single store unit to be appropriate. Based on these factors, and the record as a whole, I find that a single store unit is appropriate for the purposes of collective bargaining. Neisner Bros., 200 NLRB No. 137; Angeli's Super Valu, 197 NLRB No. 22; Angelus Furniture Manufacturing Co., 192 NLRB No. 137; Haag Drug Co., 169 NLRB No. 111, Cf. Food Marts, Inc., 200 NLRB No. 5; Gray Drug Stores, Inc., 197 NLRB No. 105; Twenty-First Century Restaurant of Nostrand Avenue Corp., Licensee of McDonald's Corporation, 192 NLRB No. 103.

For the reasons explicated above, I find the following unit to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I shall direct an election therein:

All full-time and regular part-time selling and non-selling employees employed by the Employer at its Universal City Shopping Center Store, including employees of Detroit Shoe Company; but excluding professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[3] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local 876, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO.

Dated this 10th day of April, 1973 at Detroit, Michigan.

/s/ Bernard Gottfried
Bernard Gottfried, Regional Director
National Labor Relations Board
Seventh Region
500 Book Building
1249 Washington Boulevard
Detroit, Michigan 48226

(SEAL)

[3] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington, D.C. by April 23, 1973.

[4] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236; NLRB v.

[4](continued) Wyman-Gordon Company, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list, two copies of which are requested, available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, 500 Book Building, 1249 Washington Boulevard. Detroit, Michigan 48226, on or before April 17, 1973. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Helen Pochinco, a Universal Mall salesgirl since 1965, testified that she received a five-cent hourly raise in April or May of 1973. Pochinco had received raises in earlier years. Unlike Thayer and Dickason, Pochinco had made a request for the 1973 raise.

Margaret Prano, a cashier at Universal Mall, who was a Union observer at the May 10 election,testified that she had asked for and received a wage increase in March 1973. Her hourly increase amounted to ten cents an hour.

Sharon Lee Duncan worked at the Universal Mall store for only a brief period, from February to June 1973. She recalled that she had asked for and received a small increase in May but only after some discussion among management representatives as to her sympathies in the ongoing organizational campaign.

Respondents contributed to the evidentiary material here relevant by introducing into evidence two weekly payroll timesheets from its Universal Mall business records, one sheet for the week ending February 24, 1973 and the other, for the week ending March 3, 1973. The timesheet for the week ending February 24, 1973 reveals five-cent increases for Dickason and Pochinco but no increases for anyone else on the roster. The timesheet for the following week ending March 3, 1973, reveals another five-cent increase for Dickason, a similar raise for Thayer and ten-cent raises for three of the remaining 18 or so employees on the roster.

I credit the testimony of Tonda Thayer except that I find the raise actually given her as

shown by the timesheet was for five cents, not ten. I credit the testimony of Ickason except that I find on the basis of the timesheets that her successive five-cent increases were for the weeks ending February 24 and March 3, respectively. I credit the testimony of Pochinco except that I find that the last five-cent increase to which she testified, the only one she received in 1973, was granted in the latter part of February 1973 as the February 24 timesheet shows rather than in April or May of 1973 as she recalled. Finally, I credit the testimony of Prano and Sharon Lee Duncan as to the amount and timing of their increases. Significantly, Respondents did not put into evidence timesheets to challenge the testimony of Prano and Duncan; the only timesheets put into evidence were the two already described.

The burden of proof that the foregoing raises had the illicit objective or effect of alienating the employees from the Union rests, of course, upon General Counsel. In this respect certain matters are clear. First, the raises were granted during the critical pre-election period when the organizational campaign among the Universal Store employees was at its height and Respondents were bending their every effort to defeat unionization. The recipients of the raises here under consideration were the targets of Respondents' attentions not only with respect to the raises but also with respect to other techniques employed by Respondents and described in more detail in this Decision.

General Counsel's
Exhibit 2
7-CA-10399

Summary of Meeting

This memorandum is a summary of the points which we have covered during our meetings with you.

1. Whether or not a union represents you for the purposes of collective bargaining is up to you and not up to the union or the company or the government. You have the right to refuse to sign any cards. You can throw them away. You have the right to refuse to honor any leaflets and you have the right to refuse to discuss the union with any union representative.

2. During this time that the union is trying to organize the employees, the company will expect employees to render their usual good service to the company and union organizers will not be allowed to discuss the union during working hours on company property. Employees who desire to discuss the union between themselves may do so during non-working hours, making sure that their discussions do not interrupt their normal work.

3. It is a violation of Federal Law to threaten employees with regard to their sympathies for or against the union. The company will not threaten, intimidate or coerce any employees on account of their sympathies. It is illegal for the union to make any promises or to threaten employees or in any way to intimidate or coerce employees in order to get

them to participate or to sign union cards. It is illegal for the union to promise you that they can get for you any increase in wages or benefits. If any of you have been threatened or given any promises, we would be glad to receive the information and we can assure you that we will take the appropriate action with the appropriate Federal agency to make sure that you are not harassed, threatened or intimiated.

The company believes that our employees would be better off without a union. However, we intend to be in compliance with the law and to maintain the policies discussed in this memorandum.

If you have any questions, please contact Mr. Earle V. Kanners, 548-8511.

ALBERTS

Irving Mendelson

Irving Brandt

Mr. Mikesell: I do not object

Judge Ordman: Motion granted.

Q (By Mr. Alexander): Isn't it true that during the winter and spring of this year, you visited substantially all of the stores of Alberts in the Detroit area?

A When you say the spring and winter, I visited all the stores, but I visited them in this year, 1973.

Q Yes, when was that?

A I believe the beginning of March sometime.

Q Was anybody with you?

A Yes. Mr. Irving Brandt.

Q He's another area supervisor?

A Yes.

Q You made these visits all in March?

A Yes.

Q At that time, you talked to the employees?

A We talked to everybody.

Q Isn't it true that the employees were called together?

A Yes, sir.

Q You talked to them?

A Yes.

Q Prior to the time -- strike that, please. Who prepared that document, if you know?
A I believe Mr. Breskin.
Q You did not prepare it?
A No.
Q Were you consulted during the time it was prepared about what should go in it?
A No.
Q How did it come to your possession?
A I was called into Mr. Klinsky's office, asked to read it and sign it.
Q Was it Mr. Klinsky who gave you the duty of traveling around the stores and presenting it to the employees?
A Yes, it was.
Q With respect to paragraph 2 of GC 2, do you know whether the company prior to the time you read this to the employees, had a rule which related to the subjects covered in that paragraph?
A We have had a rule in our company since before I started with the company, which is over sixteen years ago, that there could be no outside activities, no solicitation, nothing could go on other than the retail business we were supposed to conduct during the day.
Q You said you became an area supervisor in 1967, what was your employment with the company in the ten years before that?
A I was a manager with the company in different stores.
Q A store manager?
A Yes.
Q You testified to the best of your knowledge, there had never before this time been a union organizing effort in the Alberts stores?
A I said to my knowledge.

Q Yes, to your knowledge.
A Yes.
Q Did the rule you refer to having been in standing since before your employment, had that ever been written, as far as you know?
A No.
Q How did you know if its existence?
A It's been told to me at least a hundred times. It's been discussed. It's been mentioned at meetings, company meetings. It's been -- it was one of the rules we have

A My name is William B. Klinsky.
Q Where do you reside?
A I reside at 881 Covington Road, Birmingham, Michigan.
Q You're employed by Alberts?
A Yes, sir.
Q What position do you hold?
A I'm the president of the company.
Q How long have you been employed by the company?
A I've been employed by the company for twenty-three years. Since 1950.
Q How long have you been president?
A Since 1968.
Q What positions did you hold prior to that?
A I was, prior to being present I was vice-president in charge of operations, finance. Prior to that I was store supervisor. Prior to that I was store manager and buyer.
Q When did it first come to your attention that there was union activity in your stores during 1973?
A The first time it came to my attention was in the later part of February of this year.
Q I'm going to hand you a document consisting of two pages which has been introduced and marked GC 2 and I ask that you look at that, if you would. Have you ever seen that document before?
A You mean in the form it's in now or the form it was in before these stamps?
Q If you disregard the Reporter's stamp, other than that.
A Yes, sir.
Q What were the circumstances of your seeing that document before?
A This document was a result of my meeting

with the Counsel, wherein which I expressed the company policies, the company's programs.
Q Excuse me. You referred to Counsel, Who was that?
A Mr. Breskin.
Q When did the meeting to which you refer take place?
A This meeting took place shortly after the initial knowledge that there was some union interest in our store.
Q You were testifying as to your meeting with Mr. Breskin. Would you tell us what you said to him during that meeting?
A I pointed out to him the circumstances that were existing at the time. I pointed out to him in the course of the conversation that we wanted to do whatever we could do and to express whatever we could express to our employees as to what our policies and practices were and how they should conduct themselves and what they should expect during this period of intervention and interest on behalf of the union.

As a result, this document was prepared, which I felt represented our attitudes and we therefore--
Q Was the document prepared by Mr. Breskin?
A Yes. But at my request and it was physically prepared by Mr. Breskin, yes, sir.
Q You had talked to him about this before that?
A Definitely. This is a compilation of the thoughts and ideas that were expressed and it was articulated and referenced in this document.

And we then distributed it to our supervisor who in turn distributed it to the personnel in our operation.

Q I'd like for you to read to yourself, paragraph 2.
A All right.
Q Do you recall specifically discussing the contents of paragraph 2 with Mr. Breskin?
A I do.
Q Prior to your conference with Mr. Breskin where you talked about this document, did Alberts have a practice or policy which in anyway related to the contents of paragraph 2 of that document?
A Yes, sir. We had had previous experiences wherein which we had interest on behalf of various unions back in 1955 when I was the manager of the Northland store.

We had, I believe it was the Amalgamated and/or the Retail Clerks who were attempting to organize our stores. And at that time I was involved in generating and instituting these policies.

Once again in 1964 we had an organizing campaign and again in 1965. There was an intervention by the union in an attempt to organize.
Q The store people?
A Yes, sir. And therefore I had experienced and observed and seen the -- what had gone on in our stores and the problems of the disservice to the customers and I was very careful to make sure these policies were clearly known and understood by the personnel so there would be no misunderstanding.
Q Prior to your meeting with Mr. Breskin, was there a policy or rule in effect that the company which covered the topic dealt with in paragraph 2 in other than a union context?
A Yes. In other words -- you mean no solicitation?

Q However you want to refer to it.
A Yes. Absolutely.
Q Would you describe what that policy was, please?
A The policy -- it's really a very simple basic policy. We're a retail company to give service to customers. And the answer is that the employee is not to do anything that would detract from the service to the customer.

It's just that simple. The customer is allowed to freely circulate in the sales are of our store and in those areas, we expect the employees to concentrate and to devote their entire time in the service and performing a service to this customer who in turn buys our merchandise and who in turn gives us the opportunity of staying in business.
Q Prior to the preparation of GC 2 --
A What's that?
Q That's the document. This is GC-2, I'm sorry. Had any rule relating to no soliciation or employee activities of that nature been put in writing by the company that you know of?
A Say that again, sir.
Q Had you any rule that was reduced to writing before this document was prepared, which related to no solicitation.
A No, sir.
Q In your experience as a store manager, how long were you a store manager?
A I was a store manager from 1950 to 1957. Seven years.
Q Was that unwritten rule which you described in effect at that time?
A Absolutely.

Q How long have you had that job?
A About five and a half years.
Q When you say all the store, what specifically--every store that Alberts runs?
A All the stores excepting Chicago. We don't get to Chicago very often.
Q During May of this year, did you have occasion to be in the Universal Mall store?
A Yes.

Q I'm handing you a picture which at the bottom is marked GC-4. It's a picture of an automobile. Do you' recognize that automobile?
A Yes, it's mine.
Q Do you recognize the person seated behind the steering wheel?
A That's me.
Q Do you recall the time when that picture was taken?
A I would say it was about either twenty or twenty-five minutes after nine.
Q On what day?
A The day -- I don't know. Oh, yes, I do. I think it was a Friday.
Q In what month? Maybe I can help you. Would it have been sometime in May of this year?
A It's been so long ago, I didn't keep no track. After that was done, I forgot about it. But I remember it was a Friday.
Q Where were you when the picture was taken?
A I was right across the street from the Universal Mall, at the Froling Lanes.
Q In the parking lot?
A Yes.

Q How did it happen you were there? That evening, sitting in your car?
A I was at the Universal Mall doing what I do normally.
Q When was this?

auditing and accounting and is responsible for the financial for the financial end of our company.
Q All right. Do you have management employees at the central office designated store operations supervisors?
A Yes, sir.
Q To whom do they report?
A The store operations supervisors report to me.
Q What is their general -- how would you describe their responsibilities generally?
A Well, they are -- they are -- they are line officers. In other words, we have -- we have Mr. Brandt and we have Mr. Mendelson and we have Mr. Lazar and we have Mr. Schwartz, Mr. Ron Schwartz, and we have Mrs. Murphy who are the line supervisors who deal directly with the stores and the personnel therein.
Q Which supervisor is responsible for the General Motors building store?
A That's Mr. Irving Brandt.
Q And those supervisors are responsible -- the stores are split up amongst those supervisors, are they?
A Yes, sir.
Q And they're each responsible for a certain number of the company's stores?
A That's true.
Q Now the company's buyers -- the company does employ people in the classification of buyer, does it not?
A Yes, sir.
Q Who do they report to?
A They report to -- they report directly and ultimately to Mr. Ernest Schwartz who is the head of our total merchandising.

Q Do the buyers work out of the Ferndale general office?
A All of the buyers are centralized in our main buying office at the 10811 North End location and, of course, their functions are not only to purchase the merchandise, but they're quite active in visiting the stores and working with the personnel.
Q What do they do when they visit the stores?
A Well, their job is to first make the determination as to the physical appearance and the layout and the characteristics of the merchandise. Then after they visually observe what the merchandise and the layout of it is, then they are in the process of talking with and discussing with the personnel what the hot items are. They talk with the personnel as to what items they think should be reordered. They just work in general with the people on the floor.
Q How many people are there in the classification of buyer approximately?
A Between buyers and assistant buyers there's about twelve.
Q And those twelve are engaged in the buying function that you just described, is that right?
A Seven of them are engaged in both ends that I've just discussed, the going to New York and purchasing the merchandise and then getting out to the stores, and the other five are their assistants and they do not get to New York but they do get to the stores themselves.
Q All right. Now what, if anything, do the store managers -- what part, if any, do the store managers play in the buying function? Do they ever go to New York?
A No.
Q They never go to New York to buy?

A No, sir. Their function is operations and personnel. They are not involved in any merchandising at all.
Q Do they determine the levels or the quantity of merchandise in their particular stores?
A No, sir.
Q Do they determine the pricing of merchandise in their stores?
A No, sir.
Q Who determines pricing?
A The buyers.
Q Now Mrs. Murphy you say is a store supervisor who's engaged in auditing and the cashier function. What does she do? Does she ever visit the stores?
A Oh, yes. Her job is primarily visiting the stores. Her job is to -- is to train the individual employees. If a cashier were to be lost in a particular store, she would --
Q By lost what do you mean?
A Well, she would leave us for whatever reasons she left.
Q Okay.
A It would be Mrs. Murphy's function to get to that store to determine the candidates that are being presented and to train those people in the -- in the operation of the -- of the daily cash report and the functions that are required at each individual store. She moves -- she moves the people around. In other words, she is involved in making the determination of which let's say assistant cashier is now qualified to become a full cashier in some other store and she will transfer the party or discuss the interests of that individual and make arrangements to move that party to some other location.

Q Now you described those supervisors you've been talking about, the store operations supervisors, as line supervisors. What does -- in addition to those people, what does the headquarters staff consist of?
A Well, we have a credit executive, Mr. Cendron, and we have Mr. Asher who is our director of receiving and distribution and we have Mrs. Sachs who is our director of advertising and we have Mr. Fedon who is our supervisor of

Q That's done by Cendron as well?
A We have a central office function. We have a staff of collection employees who do that exclusively.
Q All right. Now you said that Mrs. Sachs is in charge of advertising. Are there ever any instances of which you are aware where advertising is handled on a store-by-store basis by the store manager?
A No. The store manager does not do it on an individual basis.
Q The store manager, for instance, the G. M. manager, would not place an ad herself, is that correct?
A No, no. Absolutely not.
Q Mr. Asher is in charge of the warehouse. Is there ever any warehousing function that's carried on in the particular stores?
A No, sir.
Q Mr. Fedon you said was in charge of systems. What do you mean by systems? What does systems mean?
A Well, obviously to run a group of forty-eight stores, we have a tremendous amount of paper flow that emanates from central office to the individual stores, from the stores back to our central office, from store to store, and in order to maintain any kind of record keeping or any kind of semblance of control, we have a multitude of forms and records that are designed and sent out and worked with between the stores.

How Mr. Fedon is involved in designing these and in communicating with the individual stores on their proper use.
Q And then each store follows those systems that he sets up, is that right?

A Absolutely. Sure.
Q Would a store manager be empowered to establish his or her own systems which would be different from those established by Fedon?
A No, sir.
Q All right. Now Mr. Grunis is in charge of security. What in general terms does he do?
A Well, his responsibilities are to protect the assets of the company, and protecting the assets of the company are normally two-pronged. It's protecting it against the public that would come in normally and attempt to dissipate our inventory, and it's also to protect it against internal problems that might be caused by employees dishonesty.

So Mr. Grunis is involved in the controlling and protection in that area.
Q Now, Mr. Klinsky, in the hearing in Case No. 7-RC-11675, which involved the company's Universal store, you testified, did you not?
A I did.
Q And in that hearing you testified regarding the hiring procedure of the company. Have you since your testimony had

Q During that period, just the last couple years in general reference, were there any stores closed?
A Yes, sir.
Q What was that?
A Well, we closed the store at Miracle Mile in Pontiac. We also closed the John R and Twelve Mile store in Madison Heights.
Q And what caused you to close those stores? What was the reason why those stores were closed?
A Poor business.
Q Just economics?
A Economics, yes.
Q All right. Now I cut you off. Were there any others that you can remember that were closed?
A In this general area?
Q Yes, in this area.
A I think not.
Q All right. Now during the time that the Gratiot store was closed, what happened to those -- would that have been for a period of six months or --
A No. It took thirteen months.
Q Thirteen months. All right. What happened to the employees who were employed at that Gratiot store at the time of the fire?
A For the first six months, the company continued paying them. They were being held as our employees waiting to come back to the Gratiot and Seven Mile store. After the six month period, we placed them in our other stores.
Q All right. What happened to the employees at the Miracle Mile store when it was closed?
A Well, they were placed -- they were offered positions in our other stores.
Q Is the same true of the John R store?
A Yes, sir.

Q Going back for a minute to something we talked about earlier, Mr. Klinsky, the buyers, now they all work out of the general office in Ferndale, right?
A That's true, sir.
Q Now would you describe for us what they do on these store visits?
A Well, on their store visits -- their store visits are designated to working with the merchandise primarily. They observe the levels of inventories, the cleanliness of the inventories, the layout of the stores, and they convince themselves that the stores look as attractively as they possibly can. At the same time they communicate markdowns, at the same time they communicate transfers of merchandise between the stores, and at the same time they will talk with the personnel and attempt to get firsthand experiences of what the sales people are experiencing as to

Q (By Mr. Mikesell): Mr. Klinsky, does the company employ an outside organization on a contract basis that does what's referred to in the retail trade as shopping?
A Yes, sir.
Q Who is that that you employ?
A That's Seaboard Shopping Service.
Q What do they do? What does Seaboard do for your company?
A Well, they're under contract to go into each and every one of our stores and they visit them a certain number of times per month or whatever we contract for. They will approach customers on our behalf or rather approach sales personnel on our behalf and they will make an evaluation and send us reports as to their appearance and how they were approached and whether they asked to open up a charge account.

go right to their locker and put it in and I tell them that they're suppose to put it behind the desk. The manager is suppose to put a little tag on it and that's where it's suppose to be held.
Q Have you ever issued any written directives or instructions with respect to store security?
A Yes. When I first came on the job, about three or four months after I came on the job, myself and several of the supervisors we compiled what we call a security guideline, and we had a meeting and we passed them out to all the managers and this is what I work from when I go into the stores.

Mr. Mikesell: Would you mark that for me, please.

(Thereupon a document was marked Employer's Exhibit No. 1 for identification)

Q (By Mr. Mikesell): Mr. Grunis, this document that I'm handing you has been marked for identification E-1 at the bottom. Could you identify that, please?
A Yes. This is the security guideline that we published only ours has a red cover to it.
Q But this is --
A This is the information which is in this portfolio that we have. This is all the information.
Q Okay.

Mr. Mikesell: I'd like to offer that.

A Yes, that's correct.
Q Now are those programs applied to employees on a uniform basis from store to store?
A Yes, they are.
Q Would that uniformity extend to the Alcove stores?
A Yes.
Q And to the boutique store?
A It applies to all the stores.
Q It does not apply to the Arlan's store though, does it?
A No, it does not.
Q Now, Mr. Felder, with respect to those benefits, let's take vacation as an example. What's the company's vacation benefit?
A The company's vacation benefits are that they pay a week's vacation after one year of employment, two weeks paid vacation after two years of employment, three weeks paid vacation after ten years of employment.
Q Does any store manager have the power to grant a vacation allotment different from that you've described?
A No, they do not.
Q In the area of holidays, what's the company's benefit?
A The company's benefits with regard to holidays are that we pay six legal holidays, that's Christmas, New Year's, Memorial Day, Fourth of July, Labor Day and Thanksgiving, plus a seventh paid holiday which is the employee's birthday.
Q Is any store manager empowered to grant paid holidays any different from that you've described?
A No.

Q All right. In the area of insurance, does the company have any benefit for selling and non-selling store employees?
A The insurance program is through Blue Cross and Blue Shield. The benefit program works in this manner. That an employee has to sign up within the first thirty days of employment and the employee pays the amount that the insurance costs for the first three months. After three months of employment, the company picks up half of that insurance cost and after six months the company pays the full amount of the insurance cost.
Q Is any store manager empowered to grant a different insurance benefit to his or her employees than what you've described?
A No. These benefits are all controlled by the payroll department at the central office.
Q Now those benefits apply, do they not, to all the stores in the Detroit area and outside the Detroit area, is that correct?
A That is correct.
Q All right. Does the company have any policy with respect to employee discounts?
A Yes. The employees are entitled to a twenty percent

six months or longer.
Q Mr. Felder, if you could generalize with respect to the temporary transfers, which are covered in Exhibit E-3, would you say those transfers would be of a voluntary nature or of an involuntary nature?
A They're of a voluntary nature.
Q The temporary transfers would be of a voluntary nature?
A Yes, sir.
Q Well, how would that work exactly?
A Well, if we have a sale, the supervisor would call the store and would say I need so many people for a certain occasion. Let's say it's for a store opening or it's a special sale or it's for some other reason like somebody is sick and I need one or two people to fill in at this store. Now the store manager would go to his people and say would you like to go to this store, we need somebody over there, and if the person wants to go, fine, and, if they don't want to go, we'll have to go find somebody else.
Q So if they couldn't find anybody, the store would just have to go begging?
A Right.

the school to try to get her some help in the stock department. I called Cass I believe it was a few times and tried to get her some help and I have gotten her a stock boy once or twice.
Q Now if Miss Marmon, who is the store manager, is hiring, would you and have you ever become involved in the actual process of her hiring employees?
A Yes.
Q What was the extent of your involvement?
A Well, she would be hiring through my orders to start with and she would discuss it with me as to the type of person she is contemplating putting on if I hadn't been there and met this person.
Q Have there been occasions where you have been there and met applicants and reviewed applicants?
A I've taken some applications while I was there when she was busy or she wasn't there during her vacation or something like that. At that time I may have taken some applications and left them with her, yes.
Q Mr. Brandt, are you familiar with the review of applications by the security officer of the company?
A Yes, I am.
Q To your knowledge, how does that review operate at least with respect to the stores that you're responsible for?
A All applications are to go to Mr. Grunis for his

Q Then the store manager would make the decision on who to hire, is that correct?
A In many cases she would discuss it with me.
Q In all cases?
A To the best of my knowledge -- are we speaking about General Motors specifically?
Q Yes, let's talk about General Motors.
A Yes, I think she would discuss it with me.
Q In every case she talked it over with you before she hired a person?
A Yes.

Q Yes, how would they happen?
A Well, they could be -- they could originate by special orders requested from one store to the other.
Q Well, how does that -- how does that take place? Mechanically how does it work?
A Mechanically if a customer asks for a certain garment that is not in one of the stores, the sales girl would get on the phone and call unit control to find out which store shows this particular item.
Q Where is unit control?
A At the main office.
Q Okay. Then what happens?
A In Ferndale.
Q Then what happens?
A Then she would probably get a list of the different stores that possibly have this garment in stock. She would then call these different stores starting with one and try to locate the particular item that she wants. Then she would direct them to transfer it to the originating store. That's one reason for a transfer.

Another reason for a transfer would be if the buyers feel that one store needs a certain number of certain items that another store is overly stocked with, they would direct this transfer.
Q Now the first instance you talked about where the sales

A They would be unable to make that decision.
Q Mr. Brandt, do you ever get involved in the temporary transfer of employees from one store to another for any reason?
A Yes.
Q Now when a store, for instance, when you have one of these special sales or 3-D days, whatever it might be, needs employees, who makes the determination of where the employees come from to augment the staff at that store?
A I do.
Q If it's one of your stores?
A Right.
Q And then what do you do when you make that decision?
A I will call certain stores and I might specifically ask for certain people to work in the store for this certain event, and, if none of those people are available, I will ask the manager if he can get some people that will come down to work in that store.
Q You tell him the number and you either ask for a specific person, or, if they're not available, then he or she will send someone?
A Or even if they are available, I may ask for those certain people plus other people that he can come up with.
Q Has it ever happened so far as you know where an employee has been asked to go to a store temporarily and has refused to

Q Has there ever been an instance of which you are aware where Miss Marmon has given one of her employees an increase where you were not involved in that?
A No.
Mr. Mikesell: That's all I have.
Hearing Officer: Mr. Firestone?
Mr. Firestone: Just a few questions. Does he have the exhibits in front of him?
The Witness: Yes, I have them.

RECROSS EXAMINATION

Q (By Mr. Firestone): Would you look at Exhibit No. 3, please, the temporary transfers. Now directing your attention to page two, about a third of the way from the top you'll notice a Patricia Trate transferred from Northland to Woodward on 5-27-72?
A Yes.

A A dollar seventy an hour.
Q Now how was it determined that -- who made the decision as to what rate she would start at?
A Mr. Brandt.
Q Did he inform you of that?
A Yes.
Q When did Rosa Dash begin her employment at the G. M. store?
A About a day or two after Lorraine. It would be in the same month.
Q What rate did she start at?
A A dollar seventy.
Q Who determined that rate?
A Mr. Brandt.
Q Did he tell you?
A Yes.

Hearing Officer: Off the record.

(Discussion off the record)

Hearing Officer: On the record. In an off-the-record discussion, the parties worked out a stipulation after examining some inter-store transfer memos. Mr. Mikesell, would you like to present that?

Mr. Mikesell: All right. I'll give it a try. During the months of March and April, 1973, there were thirty-one separate transfers of goods from the G. M. store to other

call unit control and find out what stores had this particular coat in that size, and then she would proceed to call the stores that were listed on the sheets that they would give us of so many stores.
Q Over the phone this would be?
A Yes, over the phone.
Q Okay.
A She would find the coat and they would send it into us them. Whatever store that she found had this coat would send it into us.
Q Might the sales person in your store make more than one call to another store in each instance?
A Yes.
Q How many calls would you estimate might be made on an average?
A On an average. I would say on an average of about four.
Q Now when they call the other stores, who would they talk to?
A They would ask -- if they're calling for a coat, they would be asked to be connected to the coat department. Then whatever girl took that call, anyone from the coat department, or, if it was for sportswear, it'd be anyone from the sportswear department.
Q It would not necessarily be a person from management in that other store?

A Yes.
Q Is there any essential difference between these stores?
A No, sir.
Q Are some stores larger than others?
A Yes, sir.
Q In terms of square footage?
A Yes, sir.
Q Are some stores larger than each other in terms of the number of people that work in these stores?
A Yes, sir.
Q What are the sizes of the stores in terms of number of people? What does it range from to what?
A It can run from a minimum of six to a maximum of fifty.
Q Fifty?
A Yes.
Q Five-o?
A Right.
Q Now the merchandise which is sold in those stores, is it all ordered centrally?
A It is.
Q Where is the merchandise received for these stores?
A It's received at our central distribution center at 10811 North End, Ferndale, Michigan.
Q How does this merchandise then get to the individual stores?
A The merchandise is worked on by a team of buyers and distributors who make the determination what merchandise and what quantities are to be shipped to each of the branches.

The distributor then sends out a distribution sheet to the pickers, the pickers pick it, it's

charged out and invoiced to each individual store, and then it's put on our central trucks and shipped out to our individual stores.
Q So that there is central purchasing of all the merchandise in all these stores, is that correct?
A Absolutely.
Q Do you have a central payroll facility?
A We do.
Q Where is that?
A That is located at the same address.
Q And are all payroll checks made up there?
A They are, sir.
Q For all of these stores?
A Yes, sir.
Q Now does each store have a manager?
A They do.
Q Is there supervision beyond the manager of the stores?
A Yes, sir.
Q Who are they? Who are the supervisors?
A The table of organization is a store manager and two assistants. One in ready-to-wear and one in sportswear.
Q Above the store manager, what is the supervisory organization?
A Well, there are three supervisors that supervise the individual store operations and there are six coordinating supervisors who are merchandising supervisors.
Q Now the line supervisors, the non-merchandising supervisors, do they report to you?
A They do.
Q And there are three of those?
A That's true.
Q Do the three of them handle more than one store each?
A Yes, sir.

Q Do these line supervisors over the manager handle a portion of those twenty-three stores?
A I'm sorry. Say that question again.
Q Is there one line supervisor that handles all of these twenty-three stores?
A No, sir.
Q Are the twenty-three stores then broken up?
A Yes.
Q. Among how many of them?
A Two supervisors handle the twenty-four stores in question.
Q And both of them are located here in Detroit?
A Yes, sir.
Q And both of them report to you?
A Yes, sir.
Q Now one of the supervisors handles how many of the twenty-three stores?
A I'm not sure. I'm not sure on the distribution. I could compute that very quickly, but I just haven't computed it. I would say fifty-fifty if I had to right now.
Q All right. So one handles twelve or thirteen?
A That's right.
Q Now the rates of pay which are paid employees, do you have a starting rate?
A Yes, sir.
Q The starting rate applies to all fulltime employees?
A Well, fulltime and parttime.
Q Do you have a separate starting rate for parttime employees?
A Yes, sir.
Q Do you have a separate starting rate for fulltime employees?
A Yes, sir.
Q Who determines those starting rates?
A Basically I do.

Q You determine the starting rate for both fulltime and parttime?
A That is true.
Q Now is the starting rate then uniformly applied in all of these stores?
A It is.
Q Do you have any other common fringe benefits such as vacations?
A Yes, sir.
Q Who determines the amount of vacation?
A The decision is mine. The decision for the fringe benefits is basically my decision, but it's done in concert with other persons that I consult with.
QWho are those other persons that you consult with?
A I consult with the store supervisors, the treasurer, and normally a team of no less than two store managers -- two senior store managers.
Q Where are these store managers from?
A The store managers are from this unit of twenty-four stores.
Q These are two store managers taken from the twenty-four stores?
A They are normally the store managers with the most experience and ability to help us make a wise decision.
Q Then you consult with this group and you make a final decision of what the fringe benefit level will be and what the starting rates will be, is that correct?
A That is true.
Q Do you happen to know what your current vacation program is?
A Yes, sir.
Q What is it?
A Currently we are offering one week with pay

after one week, two weeks with pay after two weeks --
Q Pardon me. One week with pay after one week of service?
Mr. Firestone: That's beautiful.
The Witness: I'm sorry. One week with pay after one year of employment, two weeks with pay after two years of employment, three weeks with pay after ten years of employment, and four weeks with pay after twenty years of employment.
Q (By Mr. Breskin: Do you know whether or not this vacation schedule is uniformly applied in all of these twenty-four stores?
A It is, yes, sir.
Q It is?
A Yes, sir.
Q Do you have a holiday program?
A Yes, sir.
Q Do you know what the holiday program is?
A Yes, sir.
Q How many holidays do you grant?
A Well, we grant the six legal holidays.
Q All right. Do you know whether or not these holidays are applied uniformly throughout these stores?
A Yes, sir.
Q They are?
A Yes.
Q They're the same in all the stores?
A Yes.
Q Now you stated that you have meetings from time to time to determine the level of wages and fringe benefits, is that correct?
A That's true.
Q How often is this done?

A Well, the major review by top management is normally in October of each year. Once a year.
Q October?
A Yes.
Q Did you have such a review in October of '72?
A Yes, sir.
Q What determination did you make at that time? What did you do at that time?
A Well, we had this meeting of the individuals that I stated earlier and at that time we have an opportunity of reviewing competition, we have an opportunity of reviewing what our benefits and our schedules are, and we attempt to maintain a competitive condition to the entire communities

Q That would require --
A Approval from somebody at a higher level.
Q All right. Now on the scheduling of vacations, the scheduling of time off for vacations, is that done by the manager?
A It's done by the manager but within the confines of the policies that we have set forth for when vacations should take place.
Q Okay. When does -- who determines when vacations are going to take place?
A Well, again, that was a top priority decision that myself and this -- primarily myself.
Q Would that be a certain period of time say within three months?
A Say within from May -- from May to August.
Q I see. Then the store manager has latitude within that period of May to August?
A That's true.
Q But if he wants to grant vacations in April or in September, does he have to get prior approval from someone?
A Yes.
Q From his supervisor?
A That's true.
Q The merchandise that is in the store, the kind of merchandise, does the manager determine that or is that determined by the home office?
A No. That's determined by the central office. The merchandise in the store.
Q The quantity of the particular merchandise, is that determined by the home office or is that determined by the store manager?
A No, that's a home office function. That's a buyer's function.

CROSS EXAMINATION

Q (By Mr. Firestone): Mr. Klinsky, do you

have in front of you or can you get in front of you Employer's Exhibit No. 1 which is the permanent transfer list?
A Yes, sir.
Q Now I've counted the number of people on the list, but I wish you would count them. My figure that I came up with is forty-nine. Would you verify that?
A That's true, sir.
Q Now would you also verify that the number of employees that are listed on that sheet who were and are employed at

Q Who hires employees to fill vacancies at the Universal City store?
A The store manager.
Q Is it possible for that store manager to hire an employee at a rate in excess of what you call your procedure strike that -- your policy for hiring fulltime and parttime employees?
A Yes, sir.
Q Isn't it a fact that some employees are hired at higher rates than others?
A Yes, sir.
Q Who makes that decision?
A Basically that decision is made by the store manager in conjunction with his supervisor.
Q Are you saying that before a person is hired at a rate in excess of what your company policy is that the store manager consults with his supervisor in each case?
A Yes, sir.
Q That you know is a fact or are you telling me that that is company policy?
A I'm telling you this is company policy.
Q Now before an employee is hired at the rate indicated by company policy, does the store manager have to clear that with any other person?
A I'm sorry. Say that again, sir.
Q I'll rephrase my question. You have an opening in your Universal City store, for example, and a person comes in and makes out an application. Based upon what you've testified to, the store manager would know the rate of pay to pay that person?
A Yes.
Q Can the store manager hire that person?
A Yes.
Q And the store manager has hired that person or a similar person in the past, is that right?

A Yes, sir.
Q So there is no need for the store manager to consult with any other employee when they fill vacancies at the rate specified by the company?
A That is true.
Q And they make the sole determination of who is to be hired, is that correct, in that instance?
A In that instance, yes, sir.
Q And the only time that they have to ask for advice and consent is when they hire at a rate in excess of what the company policy is?
A That is true.
Q And your testimony is to the best of your knowledge that is done in each case, is that right?
A That is true.
Q But you have no personal knowledge of whether it's done in each case?
A That is correct.

Q Would you be aware of employees who have requested transfers that have been refused them?
A No, sir.
Q Would you be aware of any employee who requested a transfer and was told that they must stay in the store that they're in?
A No, sir.
Q Those just don't come to your attention?
A That is true.
Q Now let's use the Universal City store again as an example. How many employees roughly are in that store?
A Twenty-five.
Q How many employees are employed in a sales capacity?

REDIRECT EXAMINATION:

Q (By Mr. Breskin): I'd like to go over first in a little more detail the organization. You testified that these stores are controlled by a group of supervisors, part of whom are line supervisors and part of whom are merchandising coordinators.

A That's true.

Q What is the primary function of these line supervisors? What do they do?

A The line supervisor is responsible for the mechanical operation of the stores. In other words, they begin from the interior of the stores observing windows, observing conditions of the store in terms of cleanliness, observing store arrangements, but their primary function is the function to supervise and control the personnel in the organization in the individual stores.

Q Now do these line supervisors travel?

A Yes, they do.

Q Do they travel to the stores that they supervise?

A Their entire working hours are spent going within the twelve or fourteen or fifteen stores that they are identified to control.

Q Now you say that their primary function is to control personnel?

Mr. Firestone: I object. I don't think that's what he said at all.

Q (By Mr. Breskin): All right. What did you say? What is their primary function?

A Their primary function is -- it's the supervisor that we're talking about now?

Q Yes.

A The primary function of the supervisor is to control the entire operation of all of the stores. They are responsible for the determination of the manager's performance, they are responsible for

the determination of the assistant manager's performance, and they're responsible to see that the payrolls are kept within the guidelines that are instituted by the main office. They observe the performance of the individuals in the stores. They pass on schedules. They're consulted on all store operation functions that normally would be in the realm of discretion of management.

Q Okay. Now you mentioned schedules. You previously testified that a schedule is posted in each of these stores.

A That's true.

Q What do the supervisors have to do with these schedules?

A A schedule is submitted to -- each store manager mails

managers. Is that correct?
A That is true.
Q Now you testified that stock boys or stock men or porters, if they're in high school, are hired between a dollar sixty and a dollar sixty-five, is that correct?
A If they're high school?
Q Yes.
A Between a dollar sixty and a dollar sixty-five, yes, sir.
Q And if they're not high school, they're hired from a dollar seventy to a dollar seventy-five, is that correct?
A Normally that's true.
Q Now if the store manager wants to go beyond the schedules, that is, to hire a high school stock boy in excess of one sixty-five, does he have to obtain the consent of anyone else?
A Yes.
Q Who would that be?
A The store supervisor.
Q That is the line supervisor to whom you have testified about?
A Yes.
Q Just previously?
A Yes.
Q If he wanted to hire a stock man who was not a high school student at above one seventy-five, would he have to get approval?
A Yes.
Q Do you know as a matter of fact whether they do seek approval?
A Yes.

Q Now if he wanted to hire a cashier above two twelve per hour, my recollection is you testified they're hired from one eighty to two twelve, --
A That's true.
Q --would he have to seek approval?
A On an initial hiring?
Q Yes.
A Yes.
Q Now you've also testified that you hire sales personnel regular fulltime sales personnel from one seventy to one seventy-five per hour plus one percent commission, is that correct?
A That's true.
Q Now if he wanted to hire a saleslady for two dollars per hour, would he have to get approval?
A Yes, sir.
Q And this approval would have to come from the supervisor
A The store supervisor.
Q Now you testified that the store managers have the power

Hearing Officer: I have a few questions. Mr. Klinsky, when you spoke of these schedules going to the central office for approval by the line supervisor and that it's necessary to communicate back to the store, does that line supervisor choose the personnel that are to be added or deleted from the schedule?

The Witness: Numerically perhaps, but not individually. In other words, he would not select those individually. But if he would determine that he wanted five more people, he would tell the store manager, you know, to put on five more people.

Hearing Officer: Okay. Now then the manager would make the decision as to who would work or who would not work?

The Witness: You mean as to the individual who was selected?

Hearing Officer: Yes.

The Witness: Yes, ma'am.

Hearing Officer: Now there has been some talk about temporary transfers. Now how are those generally arranged?

The Witness: Well, let's take a most recent example. We just opened two stores and we needed -- we needed let's say seven or eight additional people in each store to handle the grand opening sale. The supervisor knowing the area will call the store managers in the other stores and will make the arrangements to pull these girls into the stores where we need them. Now that would be true with Downtown Detroit Days, special events like mad midnight sales, anniversary or any special kind of events that we might have.

Hearing Officer: So that the line supervisor would communicate with various store managers?

The Witness: Right, and they would select -- they would select the people. Maybe we would need one in ready-to-wear, one extra cashier, an extra porter, or two people in sportswear. Whatever was necessary in order to fill in that complement of personnel in each division within our store.

Hearing Officer: I see. Now you say during the Christmas season and during the summer season and because of vacations that it's necessary to hire ~~temporary people~~?

The Witness: Yes, ma'am.

Hearing Officer: Now is this done at the store level?

The Witness: The hiring of the people is done at the store level, yes, ma'am, --

Hearing Officer: I see.

The Witness: -- but the ads, for instance, to pull them in are done out of our central office. Advertising for help is done out of our central office.

Hearing Officer: Now do all your staff personnel punch timeclocks? Do the store personnel?

The Witness: Yes, ma'am.

Hearing Officer: When a person from one store is temporarily transferred to another store for some type of special event, does that person punch a timeclock at the store where he or she is working?

The Witness: You mean at the new store?

Hearing Officer: Yes.

The Witness: No. No, she's paid -- she's paid on the payroll of the other store. In other words, the store that she comes from is where she is paid from.

Hearing Officer: That store is charged for her time?

The Witness: That's right.

Hearing Officer: I see. Now is there any type of a grievance situation or a grievance procedure informal or formal within the company?

The Witness: Yes. The grievance procedure is basically if there was a problem let's say between management and personnel?

Hearing Officer: Yes.

The Witness: Well, I'm going to have say yes because I can give you an example of where I was called the other day by an employee and I went over to her home and we talked about it. I mean, it's that kind of an informal situation. She was from the store that I one time managed myself. The supervisors are the arm and the ear protecting the store personnel from abusive conduct by anyone in management within a store.

Hearing Officer: I see.

The Witness: So the people in management know that they are answerable to that supervisor and/or to myself or the other executives if something of an unreasonable nature is being imposed. They have, you see, that kind of recourse.

Hearing Officer: Okay. So if employees do have problems at the store level, they are free to contact either the line supervisor or an executive?

The Witness: Anybody in supervision or any executive or any officer. Our telephones are open to them.

Hearing Officer: Now you said that happened once within the last week?

The Witness: No, I'd say this happened once

within the last let's say three months.

Hearing Officer: Oh, within the last three months?

The Witness: Yes, ma'am.

Hearing Officer: Do you have any type of an estimate on how often it's happened within the last year?

The Witness: No, ma'am, I do not.

Hearing Officer: Okay. Now is any type of disciplinary action ever taken which would result in, say, a day off or two days off? Anything along that line?

The Witness: You mean a grievance procedure where we might penalize an employee based on some kind of conduct by giving them time off?

Hearing Officer: Yes.

The Witness: No, ma'am.

Hearing Officer: Nothing like that?

The Witness: No.

Hearing Officer: Is there any type of reprimand system where they're given a written warning for conduct that's unbecoming to them?

The Witness: No, ma'am. They are told personally in conferences. In other words, the store manager would conference the individual employee and the communication would be made and we do have employee folders that would contain the application of the employee and it would contain when perhaps the last raise was given. It would have certain basic information that would be available to the

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OCTOBER TERM, 1976

ALBERTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1–2) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 3–10) are reported at 213 NLRB 686.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1976. The petition for a writ of certiorari was filed on December 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

[1] The decision of the Administrative Law Judge is set forth at Add., *infra*, pp. 15–71.

QUESTIONS PRESENTED

1. Whether the Board abused its discretion in concluding that employees in a single store of a chain of retail outlets constituted an appropriate bargaining unit.

2. Whether the Board correctly determined that the Company's no-solicitation rule violated Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act ("Act"), as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth at Pet. 2–3.

STATEMENT

Petitioner Alberts, Inc. (the "Company"),[2] operates a chain of 48 women's clothing stores in Michigan, Ohio and Illinois. Twenty-four of the stores, including a store in the Universal Mall, are located in the Detroit metropolitan area (Add., *infra,* pp. 17–18).

In early 1973, the Union[3] began a campaign to organize employees in the Company's stores in the

[2] Detroit Shoe Company operates under lease argeement with Alberts, Inc., retail shoe departments in at least 10 of Alberts' 24 stores in the Detroit metropolitan area, including the store in the Universal Mall (Add., *infra.*, p. 18). The Board found that Alberts and Detroit Shoe are joint employers in the stores in which Detroit Shoe operates shoe departments (see *id.* at 21–23), and Alberts does not here seek review of that determination. References herein to the "Company" include Detroit Shoe.

[3] Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL–CIO.

Detroit metropolitan area. Pursuant to a representation petition filed by the Union relating to the Company's Universal Mall store, the Board's Regional Director found that a unit comprised of the employees at that store was appropriate (Pet. App. 27–36).[4] The Board denied the Company's request for review of the Regional Director's unit determination on the ground that it raised no substantial issues warranting such review (see Add., *infra,* p. 19). A representation election was conducted on April 10, 1973, resulting in certification of the Union as the exclusive bargaining agent for the Company's employees at the Universal Mall store (*id.* at 20).[5]

The Union subsequently filed a complaint with the Board, charging that the Company had committed a series of unfair labor practices. Following a hearing on those charges, the Board found that the Company

[4] The Regional Director defined the unit as follows (Pet. App. 33–34):

"All full-time and regular part-time selling and non-selling employees employed by the [Company] at its [Universal Mall] Store, including employees of Detroit Shoe Company; but excluding professional employees, guards and supervisors as defined in the Act."

The Regional Director also determined, in a separate representation proceeding, that a unit comprised of employees at the Company's General Motors Building store was appropriate (*id.* at 11–26).

[5] The Company filed objections to the election claiming, *inter alia*, that the election had been tainted by an alleged promise by the Union to waive initiation fees for unit members. The Regional Director found the Company's objections to the election to be without merit, and the Board denied the Company's request for review (see Add., *infra*, p. 20).

had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by promulgating and enforcing an invalid no-solicitation rule. It further found that the Company had violated Section 8(a)(1) and (5) of the Act by (1) changing working conditions without consulting or bargaining with the Union, the certified representative of the affected employees, and (2) refusing to bargain with, and refusing to furnish data concerning unit employees to, the Union (Pet. App. 3–10; Add., *infra,* pp. 60–62),[6] The Board ordered the Company, *inter alia,* to rescind its unlawful no-solicitation rule and to bargain with the Union upon request (Pet. App. 9–10; Add., *infra,* pp. 62–68).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1–2).

ARGUMENT

The issues raised in the petition relate solely to the validity of the Board's unit determination and to the lawfulness of the Company's no-solicitation rule. Resolution of those issues depends upon the applica-

[6] The Board also found that the Company had violated Section 8(a)(1) of the Act by (1) granting wage increases to employees for the purpose of discouraging organizational activities; (2) coercively interrogating, threatening, promising benefits and soliciting employees to submit grievances to the Company rather than to the Union in order to discourage union activities; (3) engaging in surveillance of a union meeting and creating the impression that such surveillance would continue. In addition, the Board found that the Company had violated Section 8(a)(1) and (3) of the Act by discharging an employee because of her union activities (Pet. App. 3–10; Add., *infra*, pp. 60–62).

tion of settled law to the facts of this case. Consequently, further review by this Court is not warranted. The court of appeals correctly held, in any event, that there is substantial evidence in the record to support, and a rational basis for, the Board's decision.

1. Section 9(b) of the Act, 29 U.S.C. 159(b), empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." The Act thus vests in the Board broad discretion in determining what constitutes an appropriate unit. *E.g., Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U.S. 485, 491; *Wine & Liquor Salesmen, Local 195* v. *National Labor Relations Board,* 452 F. 2d 1312, 1319 (C.A. D.C.). In making this determination, "[t]he Board often must choose among several alternative units, each of which may have rational foundations" (*Local 1325, Retail Clerks International Association* v. *National Labor Relations Board,* 414 F. 2d 1194, 1198–1199 (C.A. D.C.)). But the Act does not require that the unit designated by the Board be the "most" appropriate unit; "the existence of alternative units which are 'appropriate' will not alone warrant reversal if the Board has chosen some other unit which is also appropriate" (*id.* at 1202). With respect to multi-store operations, the Board consistently has determined that bargaining units comprised of the employees at individual stores are appropriate absent a

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bargaining history in a more comprehensive unit or functional integration resulting in centralized control of the stores' labor policies. *E.g., Food Fair Stores, Inc.,* 204 NLRB 75, 76; *Big "N," Department Store No. 307, Big "N", a Division of Neisner Bros., Inc.,* 200 NLRB 935, 936.

The Company's position in the representation proceeding below was that the smallest unit of its employees appropriate for bargaining purposes was a unit comprised of the employees at all of its 24 stores in the Detroit metropolitan area (Pet. App. 29). Although the Board agreed that such a unit might be appropriate (*id.* at 32), it determined that a unit limited to employees at the Company's Universal Mall store was also appropriate and it properly directed an election in such unit. As the Board's Regional Director explained (*id.* at 32–33):

> On the basis of the record, it is clear that individual store managers are clothed with substantial autonomy in supervising and controlling the daily operations of their respective stores and that the centralized activities of the [Company] do not have a substantial relationship to the interests and conditions of employment of the employees at any of the individual stores, who form a cohesive and independent grouping of employees.
>
> The employees perform their day-to-day duties under the immediate supervision of the local store managers who hire them, set their wage rates, may discipline or discharge them, and who personally and effectively are involved

> in the daily determinations of personnel matters, such as setting of work hours, temporary transfers, vacations, and other terms and conditions of employment. There is geographic separation of the stores. Permanent transfers between the stores is of a limited degree and lacks sufficient significance to militate against finding a single store unit to be appropriate. Based on these factors, and the record as a whole, I find that a single store unit is appropriate for the purposes of collective bargaining. * * * [7]

The cases relied upon by the Company (Pet. 11–17) do not support its contention that a unit comprised of the employees at its Universal Mall store is inappropriate. In each of those cases, the courts or the Board found that the control exercised over labor matters by the individual stores or store managers was at most marginal. Thus, in *Gray Drug Stores, Inc.,* 197 NLRB 924, the Board found that the presumptive appropriateness of a single-store unit had

[7] The courts repeatedly have upheld the appropriateness of single-store units where, as here, the store manager exercises autonomy in operating the store. See, *e.g., Continental Insurance Co.* v. *National Labor Relations Board*, 409 F. 2d 727, 729 (C.A. 2), certiorari denied, 396 U.S. 902; *Banco Credito y Ahorro Ponceno* v. *National Labor Relations Board*, 390 F. 2d 110, 112 (C.A. 1), certiorari denied, 393 U.S. 832; *National Labor Relations Board* v. *Lou De Young's Market Basket, Inc.*, 406 F. 2d 17, 23–24 (C.A. 6); *National Labor Relations Board* v. *Lil' General Stores, Inc.*, 422 F. 2d 571, 574 (C.A. 5); *National Labor Relations Board* v. *Western and Southern Life Insurance Co.* 391 F. 2d 119, 122 (C.A. 3), certiorari denied, 393 U.S. 978; *National Labor Relations Board* v. *Groendyke Transport, Inc.*, 417 F. 2d 33, 35 (C.A. 10), certiorari denied, 397 U.S. 935.

been overcome by the geographic proximity of the individual stores, the high degree of employee interchange, and the extensive role of the district manager in the day-to-day operations of the stores. In *Twenty-First Century Restaurant*, 192 NLRB 881, 882, the Board found that a unit limited to the employees at a single restaurant in a chain was inappropriate because "the location manager [was] vested only with minimal discretion with respect to labor relations matters and the method of operation, and the exercise of his discretion [was] carefully monitored by the field supervisor who visit[ed] each location daily and the general manager who also [made] frequent visitations." The Board also relied in *Twenty-First Century Restaurant* on the frequency of employee interchange and the fact that the Company's seven New York locations were within ten miles of each other and within a single administrative district. None of these circumstances is present here.[8]

[8] Similarly, in *National Labor Relations Board* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18, 21 (C.A. 5), the court held that a unit limited to employees at two cafeterias was inappropriate because "labor policy [was] centrally determined, and [the] local managers [did] not have authority to decide questions which would be subjects of collective bargaining * * *." In *Wayne Oakland Bank* v. *National Labor Relations Board*, 462 F. 2d 666, 668–669 (C.A. 6), the court found that employees at a single bank office were not an appropriate unit because of the extensiveness of employee transfers between offices and individual office managers had little control over matters subject to collective bargaining. In *National Labor Relations Board* v. *Solis Theatre Corp.*, 403 F. 2d 381, 383 (C.A. 2), the court found that the theatre manager was not in a "decisionmaking position" and had "little or no authority on labor policy." Finally, in *National Labor Relations Board* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895, 897 (C.A. 7), the court concluded that "none of the store managers [would] be deciding questions affecting the employees in the context of collective bargaining."

2. Shortly after the Union had begun its organizational campaign, the Company distributed a memorandum informing its employees that (Add., *infra*, pp. 36–37):

> [D]uring the time that the union is trying to organize the employees, the company will expect employees to render their usual good service to the company and union organizers will not be allowed to discuss the union during working hours on company property. Employees who desire to discuss the union between themselves may do so during non-working hours, making sure that their discussions do not interrupt their normal work.

The Administrative Law Judge found that the Company previously had extended to its sales personnel "considerable latitude * * * to talk to each other while at work" and that "employees not infrequently made collections on selling floors during working hours for such occasions as birthdays, anniversaries, and church raffles" with the Company's knowledge (Add., *infra*, pp. 37–38). He also found that the Company had not shown that a rule limiting discussion of and solicitation for the Union was nevertheless required for business purposes (*id.* at 40). Accordingly, he concluded that, although the rule was not invalid on its face, it was unlawfully motivated; the "rule was actually promulgated and en-

forced 'not * * * to maintain production and discipline, but * * * to interfere with the employees' right of self-organization * * *'" (*ibid.*).

The Board agreed that the Company's no-solicitation rule was invalid because it had been discriminatorily motivated. The Board also concluded that the rule was facially invalid (Pet. App. 5–6; footnotes omitted):

> As written, the rule contains inherent ambiguities. First, it fails to specify whether the term "union organizers" refers to employee organizers or only to nonemployees. A prohibition against union solicitation by employees "during working hours on company property" is clearly unlawful. Accordingly, as the term "union organizers" could be construed to encompass employees who engage in union organizing activity, we find this portion of the rule to be ambiguous and, therefore, invalid.
>
> The last sentence of the rule is also confusing. While rules which prohibit solicitation during "working hours," as this rule apparently does, are generally presumptively invalid, an exception to this policy is made in the case of retail establishments, which, because of the nature of their business, may prohibit solicitation, even during break and lunch periods, on the selling floor. The instant ban on union solicitation, however, is not limited to the selling floor or to other public areas of the store and therefore, in our view, renders the rule invalid on its face.

The Company's challenge to the Board's determination that the no-solicitation rule was discriminatorily

motivated raises only an evidentiary issue, which does not warrant further review. Moreover, the Board correctly found that the rule was invalid on its face.

It is settled that a rule that prohibits union solicitation by employees on company property, but on their own time, constitutes an unlawful impediment to exercise of the rights guaranteed by Section 7 of the Act, 21 U.S.C. 157—absent evidence that the rule is needed to maintain production or discipline. *E.g.*, *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793. Although retail stores have been permitted to enforce no-solicitation rules within selling areas during both working and non-working hours (*e.g.*, *Food Store Employees Union, Local 347, Amalgamated Meat Cutters, etc.* v. *National Labor Relations Board*, 418 F. 2d 1177, 1180 (C.A.D.C.)), the rule at issue here was not so limited. By banning union discussion "during working hours on company property," the rule, by its own terms, applied to non-selling areas—for example, the lounges or the lunchroom. Similarly, by banning union discussion "during working hours," the rule could be understood by the employees as prohibiting such discussion during their entire shift—including break periods and other non-working time in non-selling areas. See *National Labor Relations Board* v. *Southern Electronics Co.*, 430 F. 2d 1391, 1392–1393 (C.A. 6) ("on company property during working hours"); *Campbell Soup Co.* v. *National Labor Relations Board*, 380 F. 2d 372, 373 (C.A. 5) ("during company working hours"); *Saco-Lowell*

Shops, 169 NLRB 1090, 1093 ("during working hours"), enforced, 405 F. 2d 175 (C.A. 4).[9]

[9] None of the cases relied upon by the Company (Pet. 21–22) supports the proposition that a rule couched in language reasonably interpreted to prohibit solicitation during non-working time or in non-work areas is valid. In *United Steelworkers of America* v. *National Labor Relations Board*, 393 F. 2d 661 (C.A. D.C.), and *National Labor Relations Board* v. *WKRG–TV, Inc.*, 470 F. 2d 1302 (C.A. 5), the courts upheld the Board's findings that the rules in question were invalid. *TRW, Inc., TRW Michigan Division* v. *National Labor Relations Board*, 393 F. 2d 771 (C.A. 6), involved only the issue of whether a rule had been discriminatorily motivated. *National Labor Relations Board* v. *Essex Wire Corp.*, 245 F. 2d 589, 593 (C.A. 9), and *Olin Industries, Inc.* v. *National Labor Relations Board*, 191 F. 2d 613, 617 (C.A. 5), held that an employer cannot prohibit employee solicitation during rest time. *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 645 (C.A. 2), and *National Labor Relations Board* v. *May Department Stores Co.*, 154 F. 2d 533 (C.A. 8), certiorari denied, 329 U.S. 725, involved application of a no-solicitation rule to selling, rather than non-selling, areas. Finally, *National Labor Relations Board* v. *William Davies Co.*, 135 F. 2d 179, 182, (C.A. 7), involved the discharge of an employee for soliciting during his working time.

CONCLUSION

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

The petition for a writ of certiorari should be denied.

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MARCH 1977.

230-365—77——3

ADDENDUM

Alberts, Inc., and Detroit Shoe Company *and* Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL–CIO.

DECISION

STATEMENT OF THE CASE

ARNOLD ORDMAN. Administrative Law Judge: Between May 14, 1973, and July 23, 1973, the Charging Party, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL–CIO, herein called the Union, file a series of unfair labor practice charges alleging violations of the National Labor Relations Act, as amended, by Alberts, Inc., and Detroit Shoe Company, herein referred to separately as Respondent Alberts and Respondent Detroit Shoe, and referred to together as Respondents. On the basis of these charges, Cases 7–CA–10384, 7–CA–10399, 7–CA–10411, 7–CA–10439, and 7–CA–10489, a consolidated complaint dated July 31, 1973, issued in the designated cases alleging that Respondents had violated Section 8(a)(1), (3), and (5) of the Act in specified respects. Respondents filed an answer to the consolidated complaint dated August 8, 1973.

On August 24, 1973, the Union filed an additional unfair labor practice charge against Respondents,

Case 7–CA–10563, pursuant to which an amended consolidated complaint issued dated September 5, 1973, incorporating new matter. On September 14, 1973, Respondents filed an answer to the amended complaint. As in the answer to the original complaint, the answer to the amended complaint admitted certain allegations, but denied the commission of unfair labor practices and prayed for dismissal of the matter.

A hearing on the controverted issues, with all parties present and represented, was conducted before me in Detroit, Michigan, on September 18–21, 1973. Following the close of this hearing the Union on September 24, 1973, filed an additional unfair labor practice charge, Case 7–CA–10625, averring that Respondent Alberts had laid off employee Joseph Frezza on or about May 12, 1973, and had refused to reinstate him in violation of Section 8(a)(1) and (3) of the Act. Complaint issued on this charge on October 15, 1973. Respondent Alberts filed an answer to this complaint on October 22, 1973, again denying the commission of an unfair labor practice.

In the meantime, on October 15, 1973, the same day the complaint in Case 7–CA–10625 issued, counsel for General Counsel filed a motion to reopen the record in the cases previously described in which the hearing had been closed, to consolidate those cases with the newly issued complaint and to take evidence with respect to the issues set forth in said complaint. On December 6, 1973, the National Labor Relations Board granted this motion and on December 19, 1973, denied Respondents' motion for reconsideration of its ruling.

Accordingly, the record was reopened and further hearing was conducted before me in Detroit, Michigan, on February 7, 1974, again with all parties present and represented. A separate motion to dismiss the allegations of a violation of Section 8(a)(5) of the Act, predicated on an intervening decision of the Supreme Court in *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), was submitted by Respondents at this reopened hearing. Ruling thereon was reserved and will be disposed of hereunder.

Comprehensive briefs and supplemental briefs have been filed by the Charging Party and by Respondents. General Counsel filed a response to Respondents' motion to dismiss the 8(a)(5) allegations. All submissions have been carefully considered.

Upon the entire record in these consolidated proceedings, I make the following:

Findings and Conclusions

I. Jurisdiction

Respondent Alberts is a Delaware corporation with its general office and warehouse in Ferndale, Michigan, and operates a chain of about 48 retail stores in a three-state area including about 24 stores in the Greater Detroit metropolitan area where it sells women's clothing at retail. During its 1972 operations Respondent Alberts sold goods valued in excess of $500,000 and purchased goods valued in excess of $50,000 from sources outside Michigan, which goods were shipped to its warehouse in Ferndale.

Respondent Detroit Shoe is a Michigan corporation with its principal office and place of business in Detroit, Michigan, and is engaged in the retail sale of women's shoes. Pursuant to lease agreements with Alberts, Respondent Detroit Shoe maintains at least 10 selling locations in the Greater Detroit metropolitan area stores owned by Alberts, including the Universal Mall and Lincoln Park stores. During the calendar year 1972 Respondent Detroit Shoe sold products valued in excess of $500,000 and purchased from sources outside Michigan goods valued in excess of $50,000, which goods were shipped to its Michigan operations.

I find on the foregoing facts of record that Respondent Alberts and Respondent Detroit Shoe are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find further, and it is undisputed that the Union is a labor organization within the means of Section 2(5) of the Act.

Accordingly, I find that jurisdiction is properly asserted herein.

II. THE UNFAIR LABOR PRACTICES

A. Background and Statement of Issues

Early in 1973 organizational activity began among the employees in stores comprising the Greater Detroit metropolitan area stores operated by Alberts, and so listed in the consolidated complaint. Among these stores are the Lincoln Park store, the North-

land store, and the Universal Mall store, the latter also identified in the record as the Universal City Shopping Center store. Pursuant to a representation petition filed by the Union relating to the Universal Mall store, the Regional Director for Region 7 in April 1973 issued a decision and direction of election to determine whether the employees in the appropriate unit, hereinafter defined, desired to be represented by the Union. The Regional Director, over the objection of Respondents, found that a single store unit was appropriate and defined the appropriate unit as follows:

> All full-time and regular part-time selling and nonselling employees employed by the Employer [Alberts] at its Universal City Shopping Center store, including employees of Detroit Shoe Company; but excluding professional employees, guards and supervisors as defined in the Act.[1]

Respondents request for review of the decision and direction of election was denied by the Board on May 1, 1973, on the ground that it raised no substantial issues warranting review. I find that the unit as described herein is appropriate.

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[1] The Decision and Direction of Election is captioned "Alberts, Inc., Detroit Shoe Company," and contains the following footnote:

"The name of the Employer is set forth as it was amended at the hearing. Detroit Shoe Company is a lessee at various Alberts, Inc. stores. Although it was not served with the Notice of Hearing, the attorney for Alberts, Inc. entered an appearance for Detroit Shoe Company and represented it in the proceedings. The parties agreed that any election directed should include employees of Detroit Shoe Company."

The election was conducted on April 10, 1973, and the Union prevailed by a vote of 17 to 5. Respondents filed objections to the election including, *inter alia*, a claim that the election was tainted because of the Union's alleged waiver of the payment of initiation fees by unit employees. The Regional Director in a supplemental decision, issued early in July 1973, on the basis of an investigation, found the objections in their entirety to be without merit and certified the Union as the exclusive representative of the employees in the unit already set forth. A request for review of this decision and certification was likewise denied by the Board on July 30, 1973, on the ground that no substantial issues warranting review were raised.

As already indicated, the complaints in the instant proceeding allege, in sum, that Respondents engaged in violations of Section 8(a)(1), (3), and (5) of the Act. More specifically, the complaint alleges that Respondents violated Section 8(a)(1) of the Act by certain pre- and postelection conduct, consisting of the promulgation of a no-solicitation rule, interrogation, threats, promises of benefit, solicitation and promised resolution of grievances, surveillance, and the grant of wage increases; violated Section 8(a)(3) and (1) of the Act by changing various working conditions by enforcing an invalid no-solicitation rule, and by discharging and refusing to reinstate employees Rose Jackson, Deborah Rowan, and Joseph Frezza; and violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union with respect to the

Universal Mall employees; by refusing to furnish the Union with relevant data concerning working conditions; and by the unilateral changes of existing working conditions.

Respondents deny generally and specifically the commission of the alleged unfair labor practices. Respondents deny also that they were joint employers as alleged in the complaint. Counsel representing both Respondents throughout the instant proceedings was the same counsel. With specific reference to the allegations of refusal to bargain, Respondents adhere to defenses considered and rejected in the representation proceeding heretofore described: (1) that the single-store unit at the Universal Mall store in which the election was directed was not appropriate for bargaining; and (2) that the objections predicted on the preelection conduct of the Union were erroneously dismissed. Accordingly, Respondents urge that there was no obligation to bargain and that the refusal to bargain was lawful.

The specific allegations of unfair labor practices and the defenses thereto are considered hereunder *seriatim*. Preliminarily, however, the question of the joint employer status of Respondents will be considered.

B. The Joint Employer Status of Respondents

It is admitted that Respondent Detroit Shoe maintains selling locations for the sale of women's shoes in at least 10 of Respondent Alberts' stores in the

Greater Detroit metropolitan area. These retail selling locations, which include, *inter alia,* the Universal Mall and Lincoln Park stores of Alberts, are operated pursuant to lease arrangements with Alberts as lessor and are part of the latter's retail store operations. The evidence is undisputed that, with respect to the locations here involved, Respondents hold themselves out to be one integrated operation and there is no indication to the general public that the retail shoe department is not part of Alberts' total operation. The same cash registers are used, Detroit Shoe merchandise is packed in Alberts wrappers, and the sales slips are Alberts sales slips. All sales income from Detroit Shoe is turned over to Alberts, which deducts from that sum all expenditures made in Detroit Shoe's behalf including the wages paid the Detroit Shoe employees.

So far as labor relations are concerned, Detroit Shoe employees are subject to the rules and regulations of conduct and the general working conditions established by Alberts. Indeed, William B. Klinsky, president of Alberts, acknowledged that he possessed a substantial degree of control over the hiring and firing of Detroit Shoe employees. Significant also in this regard is the circumstance, already noted, that in the representation proceeding, previously described, both enterprises, represented by the same counsel, agreed that any election there directed should include in any appropriate unit found the employees of both Alberts and Detroit Shoe.

In the instant proceeding General Counsel alleged that Alberts and Detroit Shoe were joint employers

with respect to the employees here involved. Respondents, represented in this proceeding also by identical counsel, took the position both before and during the hearing that they were not joint employers. In the briefs filed by Respondents following the close of the hearing, however, only casual reference is made to this issue.

In all these circumstances I conclude and find that Respondent Alberts and Respondent Detroit Shoe are joint employers of the employees under consideration here. The uncontradicted evidence here adduced regarding the complete integration of the two enterprises in the subject stores and the substantial control exercised by Alberts over the labor relations and terms and conditions of employment of the Detroit Shoe employees amply warrants this finding even without reference to the prior representation proceeding and the determinations made therein. See *Checker Cab Company and its Members,* 141 NLRB 583 (1963); *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962); *Thriftown, Inc., d/b/a Value Village, et al.,* 161 NLRB 603 (1966).

C. The Allegations of 8(a)(1) Violations

1. Surveillance

On the evening of May 4, 1973, the Union held a meeting for Respondents' employees at the Froling Bowling Lanes located near Respondents' Universal Mall store. During the course of that day Lena Barone and Gloria Blank, who serve as dress buyers

and merchandisers for all of Respondent Alberts' stores, learned that a union meeting was scheduled for that evening. Accordingly, after the Universal Mall store, where Barone and Blank had been working that day, closed, the two of them drove over and parked in front of the bowling alley, admittedly, according to Blank's testimony, to "look and see" what was happening at the union meeting. Sometime after they parked, and while employees were gathering at the meeting, they were spotted by union organizers who approached them and took a photograph. Barone and Blank took off hurriedly. Blank called President Klinsky and reported what she had done. Klinsky criticized Blank for her actions. However, Respondents never informed the employees that the actions of Barone and Blank were unauthorized.

On undisputed facts, therefore, it is apparent that Barone and Blank did engage in surveillance of union activity and that the employees were aware of that surveillance. Respondents defend, however, on the ground that Barone and Blank had no supervisory authority, that their actions were not pursuant to Respondents' direction or orders, that Respondents did not approve of such actions, and that Respondents were not answerable therefor. The short answer to the foregoing is, as William Klinsky, president of Alberts, volunteered, that Barone and Blank were part of management, and received the same range of pay as managers for Alberts. The record is clear that the employees also considered Barone and Blank as part

of management. Nor were the employees ever told that the actions of Barone and Blank were unauthorized. In these circumstances the surveillance in which Barone and Blank engaged plainly constituted interference, restraint, and coercion of employees in the exercise of their organizational rights, a violation of Section 8(a)(1) of the Act. *Intertype Company, a Division of Harris-Intertype Corporation* v. *N.L.R.B.*, 371 F.2d 787 (C.A. 4, 1967); *N.L.R.B.* v. *A. R. Gieringer Tool Corp,* 314 F.2d 359, 362–363 (C.A. 7, 1963).

I so find.

On the other hand, I find inadequate evidence to support the allegation that Patrick Casey, a supervisor for Detroit Shoe, engaged in unlawful surveillance of a union meeting held at the Four Vees Lounge in Dearborn, Michigan, on the evening of April 12, 1973. It is established that a union meeting was held on that occasion and that Patrick Casey, his wife, and Marlene Germeuth, a secretary and handbag buyer for Detroit Shoe, were present at the lounge during the meeting. It is also established that Patrick Casey advised his superiors of the meeting. On the other hand, Patrick Casey credibly testified that he was a very frequent visitor at the lounge, and that he came to the lounge on the evening of April 12 to celebrate the birthdays of his wife and secretary. That testimony was unshaken on cross-examination. There is no independent evidence to establish any reason for the presence of Casey and his companions that evening other than the one which Casey gave.

Absent such evidence neither a finding of unlawful surveillance or of creating an impression of such surveillance is warranted. *Atlanta Gas Light Company,* 162 NLRB 436, 438 (1966).

Accordingly, I conclude and find that General Counsel has not sustained the allegation of the complaint that Patrick Casey engaged in unlawful surveillance.

2. The grant of wage increases

The relevant allegation here, denied by Respondents, is that Respondents between March 1 and May 10, 1973, granted certain of its employees in the Universal Mall store wage increases timed to dissuade employees from supporting the Union and to vote against the Union. The Board-conducted election among the Universal Mall store employees was held on May 10, 1973.

Tonda Thayer, a Universal Mall store employee, testified that she received a 10-cent-per-hour raise in March 1973. She had never received a raise during her prior employment and had not requested the March 1973 increase. According to Thayer, Tlumak, manager of the store, who gave her the raise, commented at the time that the raise "didn't have anything to do with, you know, what was going on."

Juliette Dickason, a 4-year employee at Universal Mall, testified that she had gotten two raises in previous years which she had requested but that in the first or second week of March 1973 she had gotten two

successive weekly hourly raises of 5 cents each which she had not requested.

Helen Pochinco, a Universal Mall salesgirl since 1965, testified that she received a 5-cent hourly raise in April or May of 1973. Pochinco had received raises in earlier years. Unlike Thayer and Dickason, Pochinco had made a request for the 1973 raise.

Margaret Prano, a cashier at Universal Mall, who was a union observer at the May 10 election, testified that she had asked for and received a wage increase in March 1973. Her hourly increase amounted to 10 cents an hour.

Sharon Lee Duncan worked at the Universal Mall store for only a brief period; from February to June 1973. She recalled that she had asked for and received a small increase in May but only after some discussion among management representatives as to her sympathies in the ongoing organizational campaign.

Respondents contributed to the evidentiary material here relevant by introducing into evidence two weekly payroll timesheets from its Universal Mall business records, one sheet for the week ending February 24, 1973, and the other, for the week ending March 3, 1973. The timesheet for the week ending February 24, 1973, reveals 5-cent increases for Dickason and Pochinco but no increases for anyone else on the roster. The timesheet for the following week ending March 3, 1973, reveals another 5-cent increase for Dickason, a similar raise for Thayer, and 10-cent raises for three of the remaining 18 or so employees on the roster.

I credit the testimony of Tonda Thayer except that I find the raise actually given her as shown by the timesheet was for 5 cents, not 10. I credit the testimony of Dickason except that I find on the basis of the timesheets that her successive 5-cent increases were for the weeks ending February 24 and March 3, respectively. I credit the testimony of Pochinco except that I find that the last 5-cent increase to which she testified, the only one she received in 1973, was granted in the latter part of February 1973 as the February 24 timesheet shows rather than in April or May of 1973 as she recalled. Finally, I credit the testimony of Prano and Sharon Lee Duncan as to the amount and timing of their increases. Significantly, Respondents did not put into evidence timesheets to challenge the testimony of Prano and Duncan; the only timesheets put into evidence were the two already described.

The burden of proof that the foregoing raises had the illicit objective or effect of alienating the employees from the Union rests, of course, upon General Counsel. In this respect certain matters are clear. First, the raises were granted during the critical preelection period when the organizational campaign among the Universal store employes was at its height and Respondents were bending their every effort to defeat unionization. The recipients of the raises here under consideration were the targets of Respondents' attentions not only with respect to the raises but also with respect to other techniques employed by Re-

spondents and described in more detail in this Decision.

As the Supreme Court said a decade ago, "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *N.L.R.B.* v. *Exchange Parts Co.,* 375 U.S. 405, 409 (1964). In this context and against the background of a hotly contested preelection campaign, the otherwise cryptic remark of store manager Tlumak to Tonda Thayer that the raise given the latter did not "have anything to do with, you know, what was going on" takes on added significance. And more directly in point is the discussion among management representatives in connection with the raise given Duncan as to where her sympathies lay in the ongoing union campaign.

The inference of the illicit purpose motivating the raises is strengthened by the frailty of Respondents' defenses in this regard. See *N.L.R.B.* v. *Bird Machine Company,* 161 F. 2d 589, 592 (C.A. 1, 1947), and cases there cited. Thus, Respondents contend that "the initial wage increases were processed and given before they were aware of the Union organizing campaign" and that "the additional wage increases which may have been processed after knowledge of the Union campaign were granted the following week in order to raise all employees to the level established by the initial increases." The reference to "the initial

wage increases" is apparently to the raises given to Dickason and Pochinco, the only two raises appearing on the timesheet for the week ending February 24, 1973. Respondents' protestation that this occurred before knowledge of the union campaign is somewhat suspect inasmuch as President Klinsky candidly acknowledged that the union activity came to his attention "in the later part of February." Even assuming that the two raises given to Dickason and Pochinco for the week ending February 24, 1973, antedated Respondents' knowledge, certainly the later raises, including an additional raise given Dickason, postdated that knowledge. The handful of raises given for the week ending March 3, 1973, hardly demonstrates an effort "to raise all employees to the level established by the original increases." For the greater number of employees listed on the payroll sheet for that week were not given raises at all, and the failure of Respondents to produce any later payroll sheets cogently suggests that such sheets would not support the position they presently urge.

Respondents argue, correctly, that it is not an unfair labor practice to implement wage increases during an organizational campaign where the wage increase policy or program had been decided upon prior to the organizational campaign. But this defense, too, does not withstand scrutiny. No probative evidence sufficient to establish such a predetermined policy or program was submitted.

Accordingly, I conclude and find that Respondents violated Section 8(a)(1) of the Act by granting wage

increases to dissuade employees from supporting the Union and to influence their votes in the forthcoming election.

3. Coercive interrogation, threats, and other unlawful interference

Deborah Anne Rowan, an employee at the Lincoln Park store, was active in the union campaign and attended the April 12 meeting at the Four Vees Lounge at which Patrick Casey was present. Her union activities were known to Respondents. On the day after the Four Vees meeting, Rosario Criscuolo, manager of the Detroit Shoe department at the Lincoln Park store, told Rowan he knew about the meeting and advised her not to get mixed up with the Union. About a month or more later, Martin Felder, recently appointed personnel director for Alberts, came to the Lincoln Park store. Rowan was summoned to meet with Felder in the store lounge. Felder told Rowan that Alberts was a growing business and that the employees had been neglected but that was now changed. Felder explained the benefits the employees were receiving. According to Rowan, Felder then asked her if she had any problems, asked her to submit her problems to him, and stated that he was so advising all the other employees in the store.[2]

[2] Felder confirmed that he met with Rowan in the store lounge and discussed company benefits with her. He testified that the meeting took place in May. In either event, the discussion took place against the background of an active organizational campaign which embraced the Lincoln Park store also.

Hyman Tlumak became manager of the Universal Mall store in July 1972. Immediately after the May 10, 1973, election, Tlumak held two meetings with the employees relating to working conditions, a matter discussed in more detail hereunder. At the first meeting, according to Tonda Thayer, Tlumak announced that the Union was not in yet and he was still manager. Helen Pochinco testified that at this same meeting Tlumak stated that if the Union got in things would be "pretty rough," that the employees had "asked for it," and that is "what you're going to get." Tlumak went on to discuss the new working conditions. I credit the testimony of Thayer and Pochinco and find that Tlumak did make the remarks attributed to him.[3]

Margaret Prano, who worked at Universal Mall, testified that on or about May 5, shortly before the election, Lena Barone, already identified as part of management, took her to lunch, asked her if she was mixed up in the Union "mess," and, when Prano indicated she was for the Union, sought to persuade Prano to take her problems to management instead. Lena Barone was not called as a witness. Prano's testimony is uncontradicted and I credit that testimony.

Joseph Lee Frezza was hired as a part-time stockboy at the Universal Mall store in March 1973 and worked there until very shortly after the election,

[3] Tlumak did not testify at the initial hearing. He was called as a witness at the reopened hearing relating to the discharge of Frezza and confined his testimony almost exclusively to that subject matter.

when he was discharged.[4] Frezza credibly testified that on May 2, 1973, Manager Tlumak called him aside for a talk and told him that he, Frezza, and the other stockboy, Jim Bromm, would soon be made assistant managers, but that if the Union got in, that would not be possible.[5]

Within a few days after this May 2 conversation between Frezza and Tlumak the latter informed Frezza that President Klinsky wanted to see Frezza at Alberts' main office in Ferndale. Tlumak drove Frezza to that office. On the way Tlumak asked Frezza about a union meeting held the night before and also asked who was in attendance. Frezza did not reply. When Tlumak and Frezza arrived at Klinsky's office, Klinsky opened the conversation by asking if Frezza had any questions about the Union. Frezza had none. According to Frezza, Klinsky then stated that Alberts would not be able to employ any more part-time help, would not be able to pay them union wages, and would rather hire older, more experienced men for that work. The meeting took about half an hour. Klinsky did state in the course of the discussion that no action would be taken against anyone who voted for the Union, that no one would be fired if the Union was

[4] Frezza testified as a witness for General Counsel at the opening stages of the hearing. The legality of his discharge was not put in issue until after the initial hearing terminated. It was the later allegation that Frezza was discriminatorily discharged which led to the reopening of the hearing.

[5] Throughout this initial hearing Bromm was erroneously designated as Brown.

voted in, and that it was the choice of the employees as to whether they wanted the Union.

William Klinsky's version of the conversation differed in only minor respects. According to Klinsky, the meeting resulted from a telephone call he received from Tlumak who said that Frezza wanted to see Klinsky. Klinsky confirmed that the meeting took place on a Saturday morning early in May. He confirmed also asking Frezza if the latter had any question about the Union. According to Klinsky, Frezza replied that he knew the Union side of the story and wanted to hear the Company's side. Klinsky testified that he replied that Respondents really didn't need a union; that a union would not be in Frezza's best interests, or in the best interests of student learners, part-time people, and young adults; and that union wage rates discouraged employers from hiring young people; but that Frezza could do what he wanted.

The respective versions given by Frezza and Klinsky are in large part consistent. However, I deem it quite unlikely and do not believe that Frezza, a new and young part-time stockboy, would have requested a meeting with the president of Alberts, as Tlumak purportedly reported to Klinsky. Rather, it would appear, and I find, that the conference with Frezza was utilized by Respondents as one more technique in combatting unionization. Notwithstanding somewhat guarded language, I believe the net of Klinsky's remarks appraised either on Frezza's version or Klinsky's own version, was that unionization would have an adverse impact on the employees, particularly young and part-time employees. Such a message simply emphasized Tlumak's earlier declaration that Frezza's promotion to assistant manager would be endangered by unionization.

A month after the election, the antiunion campaign still had not abated. On or about June 12, according to the credited testimony of Juliette Dickason, Tlumak talked to a group of the Universal Mall employees on the store floor. He advised them that four girls who were Union adherents had quit and asked who would be next. Tlumak added that the Union the employees had picked was no good, would not get them anything, and was a sorry union. He stated also that if there had to be another election (objections had been filed to the May 10 election), the employees would lose out because the girls were forced into it and part-time empoyees had nothing to gain from unionization.

Based upon the foregoing evidence, I am satisfied and find that Respondents through their officers and agents engaged in coercive interrogation, threats, and promises of benefit directed to their employees, that they further created the impression that the employees' organizational activities were being subjected to surveillance, and that they solicited the submission of grievances to management rather than to the union, all to the end of discouraging unionization. I find

further that this conduct was violative of Section 8(a)(1) of the Act.[6]

4. The promulgation and enforcement of a no-solicitation rule

As soon as Respondents learned of the organizational campaign, on their own admission in late February 1973, Respondents promulgated and enforced a no-solicitation rule.

This rule was embodied in a two-page written memorandum, prepared after consultation with counsel, which was published and distributed to the employees. The memorandum generally advised employees of their rights and stated Respondents' intention to comply with the law, but informed the employees that in Respondents' view they would be better off without a union.

With particular reference to the issue here under consideration, the memorandum stated:

> During the time that the union is trying to organize the employees, the company will expect employees to render their usual good service to the company and union organizers will not be allowed to discuss the union during working hours on company property. Employees who desire to discuss the union between themselves may do so during non-working hours, making sure that their discussions do not interrupt their normal work.

[6] Respondents argue, *inter alia*, that at least their preelection conduct could not in any event be found to constitute unlawful interference because they obviously failed to prevent a union victory in the Board-conducted election. So far as I am aware, the touchstone of unlawful conduct in this regard has never been the degree to which that conduct succeeded or failed.

Klinsky, president of Alberts, Inc., acknowledged that no rule of this kind had ever been put in writing before the instant organizational campaign but testified further that the published rule was merely a restatement of a previously unwritten policy of management prohibiting solicitation or other work-interrupting activity on the selling floor. According to Klinsky, publication and distribution of the no-solicitation rule was prompted by his concern that disruption of operations and "disservice to customers" might arise from union organizing activity.

Notwithstanding the asserted preexisting policy, credited testimony establishes that considerable latitude had always been extended to sales personnel to talk to each other while at work and that employees were not reprimanded for such conduct. By way of contrast, after publication of the rule, Rose Jackson, an active and known union adherent, subsequently discharged, was reprimanded for talking about union matters on the selling floor.

Also, the record affords considerable evidence, which I credit, that employees not infrequently made collections on selling floors during working hours for such occasions as birthdays, anniversaries, and church raffles, and that among the people solicited on such occasions were Marvin Finkel, manager of the Northland store, and Mrs. Cramer, assistant manager at Northland.[7] In fact, President Klinsky acknowledged

[7] Despite extensive testimony by Finkel this evidence is uncontradicted. Mrs. Cramer did not testify at all.

that the asserted policy antedating the published rule, was one of "reasonableness."

Nonetheless, against this factual background, Respondents argue, quite correctly, that the published rule is on its face presumptively valid. Respondents argue further, and cite authorities which establish, that the mere fact that such a rule is promulgated at the start of a union campaign or that other than union solicitations took place on occasion during the pendency of the rule does not, of itself, destroy the presumption of validity.[8]

Not gainsaying these settled principles, it is equally well settled that the presumptive validity of an otherwise proper no-solicitation rule can be and is destroyed where affirmative evidence demonstrated that it was adopted and/or promulgated for a discriminatory purpose. See *Star-Brite Industries, Inc., supra* at fn. 8; *State Chemical Company,* 166 NLRB 455 (1967). Thus, in *State Chemical* the Board found that an otherwise valid no-solicitation rule was discriminatorily promulgated and enforced in violation of Secton 8(a)(1) of the Act. In so finding the Board relied on three factors: (1) that the rule was promulgated at a time of intensive union activity and was specifically directed in the first instance at a known union adher-

[8] See, *e.g.*, *Star-Brite Industries, Inc.*, 127 NLRB 1008 (1960); *The Permian Corporation*, 189 NLRB 860 (1971); *Atkins Pickle Company, Inc.*, 181 NLRB 935 (1970); *Veeder Root Company, Altoona Division*, 192 NLRB 973 (1971). *Sequoyah Spinning Mills, Inc., a Wholly Owned Subsidiary of Sequoyah Industries, Inc.*, 194 NLRB 1175 (1972).

ent; (2) that the employer permitted solicitations of other kinds during worktime; and (3) that the employer was hostile to union organizational efforts as reflected by other conduct found violative of the Act. In such circumstances, the Board held, it was incumbent upon the employer to establish that the rule, though limited to union talk and solicitation, was nevertheless required in order to maintain production or discipline. In *State Chemical,* the Board found that the employer had not done so.

In appraising the relevant authorities and with due regard for the precedents cited, I conclude and find that the facts in the instant case fall in the category of conduct controlled by *State Chemical.* As in *State Chemical,* the no-solicitation rule here was promulgated at a time of intense union activity and was specifically directed in the first instance at employee Rose Jackson, a union adherent who was subsequently discharged. The record evidence clearly establishes that prior to the promulgation of the written rule here under consideration, discussions among sales personnel were openly tolerated on the selling floor during working hours and that collections for special purposes were likewise allowed under the circumstances. Management officials were not only aware of these activities but even participated in them. On President Klinsky's own admission, the preexisting policy, to the extent such a policy existed, was one of "reasonableness," and the record is devoid of evidence of any past reprimands for infractions of such policy. Finally, the record

affords ample evidence, much of which has already been summarized herein and more to be detailed hereunder, of adamant hostility to unionization. Yet Respondents, apart from asserting an unsubstantiated apprehension that union solicitation might result in disruption of operations or "disservice to customers," made no showing that the published rule was necessary to maintain production or discipline; prior experience under the asserted preexisting policy points to a contrary conclusion.

Accordingly, I conclude and find that, notwithstanding the presumptive validity of the published no-solicitation rule, that rule was actually promulgated and enforced "not by a purpose to maintain production and discipline, but by a purpose to interfere with the employees' right of self-organization and thus violated Section 8(a)(1) of the Act." *State Chemical Corp., supra* at 456, and cases there cited.

D. The Unilateral Changes in Working Conditions

Immediately after the union victory in the May 10 election at Universal Mall, Tlumak, manager of the store, held two meetings with the employees to announce changes in working conditions. More stringent conditions were imposed. No longer were employees permitted to have coffee or smoke behind the wrapping desk whenever they were not busy. Instead, they were given two short breaks for that purpose, one in the morning and one in the afternoon. Telephone privileges—occasional personal calls had previously been

permitted—were abolished. Chairs on which employees had formerly been permitted to sit when they were not busy were removed. The former practice of permitting employees to trade days off or switch schedules was eliminated. Personal favors would no longer be granted. In addition, a new dress code was imposed. Salesgirls' attire, before, merely had to comply with a standard of reasonableness. The new code allowed only dresses or pantsuits.

It was at these meetings that Tlumak, as already noted, told the employees, in relation to the union election, that things would be "pretty rough," that the employees had "asked for it," and were "going to get" it.

Respondents, however, seek to explain these changes in terms and conditions of employment on the basis that President Klinsky, who was in the store on the day of the election, had instructed Tlumak to remedy what he considered to be a haphazard and substandard store operation adversely affecting sales. Respondents argue also that except for the change as to coffee and cigarette breaks, the other admittedly announced changes were not actually enforced.

The fact of the matter is, however, that even by Respondents' version changes were made. More importantly, Tlumak, whatever his instructions from Klinsky, made it indelibly clear to the employees why the changes were being made.

In these circumstances it is clear and I find that Respondents by announcing and making the changes in working conditions here found and in the manner

and for the purpose here found violated Section 8(a)(1) and (3) of the Act. *Robert G. Purcell, et al., d/b/a Finnical Tire Company,* 171 NLRB 242, 245 (1968); *A. S. Beck Shoe Company,* 92 NLRB 1457, 1458 (1951); *Buddies Supermarkets, Inc.,* 192 NLRB 1004, 1012 (1971).

I find further that this same conduct violated Section 8(a)(5) of the Act as alleged. It is undisputed that Respondents made these changes unilaterally and without consultation or bargaining with the Union, which had just been designated by the employees in a Board-conducted election as their bargaining representative. It is immaterial in this connection that the Union had not yet been formally certified. Respondents were aware, when they took their unilateral action, of the Union's majority status. They were thereby precluded from taking action respecting terms and conditions of employment in disregard of their lawful bargaining obligation. *Fleming Manufacturing Company, Inc.,* 119 NLRB 452, 464 (1957). And see especially *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.,* 209 NLRB 701 (1974).

E. The Discharges

1. Rose Jackson

Rose Jackson was an employee at the Northland store. Her employment began on September 11, 1972, and continued through May 23, 1973. From September 1972 through February 1973, her work record was excellent. Marvin Finkel, manager of the Northland

store, conceded that she was a "good" or "okay" employee throughout these months. Consistent with that appraisal was Rose Jackson's testimony, which I credit, that Finkel told her at the end of that period that she was the top salesgirl in the store despite the fact that she had other duties also, and that Finkel wanted her from then on to devote herself exclusively to sales.

Beginning in March 1973, however, management suddenly began to find fault with Rose Jackson's work performance. By the time management also knew, as shown by the testimony of Irving Mendelson, Alberts' area supervisor, and by the testimony of Marvin Finkel, that Rose Jackson was active in the Union. Indeed, she was an immediate target when the no-solicitation rule was promulgated.

Rose Jackson's discharge took place on the morning of May 23, when Irving Finkel handed her a termination slip which he had prepared. The slip contained a notation that Jackson had been the recipient of several prior warnings, the first of which was dated 3–12–73. Under the heading "Reason for Termination" the following entry appeared:

> Rose Jackson scheduled to work Sat. 5–19–73. She had said she would be a little late but would be in 1 p.m. the latest—she called at 1 p.m. to tell me a big luncheon was planned until 4 or 5 p.m. which she didn't know about. She said it wouldn't pay for her to come in since she was scheduled until 6 p.m. The regular girls work every other Sunday. It was Rose Jackson's turn Sun. 5–20–73. Said she was sorry but couldn't work Sunday either.

The evidence as to the incident which was assigned as the "Reason for Termination" was not in substantial conflict. Summarizing it in brief, Rose Jackson testified that she had about 2 weeks before the event notified Finkel that a Bar Mitzvah was scheduled for her nephew on the weekend of May 19 and 20 and that she wanted that Saturday and Sunday off. Finkel agreed and asked Jackson to remind him later so he could set up the work schedule accordingly. Jackson did remind him several days later and Finkel asked Jackson to come in on Saturday as soon as she could after the religious services were over. When Jackson left at the end of her work on Friday, May 18, the new work schedule had not yet been posted. The religious services on Saturday concluded at 1 p.m. and Jackson learned that morning that a family luncheon was scheduled thereafter. Accordingly, Jackson called Finkel and told him that she would not be in. Finkel remonstrated and told her he had planned on her coming in Finkel also informed Jackson in this conversation that he had scheduled her for work that Sunday. When Jackson reminded Finkel that she had told him a few weeks earlier she could not work that Sunday. Finkel replied that he could not rearrange the work schedule.

Jackson did not report to work that Saturday or Sunday. She did report to work Monday morning and nothing was said to her about her absence the previous 2 days. Tuesday was Jackson's day off. The following morning, May 23, Finkel summarily discharged Jackson right after she reported for work for her 2-day

absence and, when Jackson protested, added the phrase and for "other violations, too."

Finkel's version of these events, as indicated, was largely consistent. Finkel agreed that he had given Jackson permission to have Saturday morning off and stated that he had told her to come in at 1 p.m. Finkel confirmed also that Jackson called him on Saturday to state that she could not come in because of a scheduled luncheon that afternoon. Finkel testified that he objected to this and that he also told Jackson she was scheduled to work the following day, Sunday. Jackson explained that she could not come in Sunday. According to Finkel, he was upset by this situation and informed his area supervisor, Irving Mendelson, that he wanted to fire Jackson. Over the next few days there was some additional discussion with Martin Felder, personnel director for Alberts; permission was granted for Finkel to fire Jackson and the discharge took place on Wednesday morning, as already described.

Respondents were obviously concerned at the hearing as was Finkel at the time of the discharge itself that the assigned reason for termination, namely, the "Bar Mitzvah" absence, was a less than plausible explanation for the discharge of a top salesgirl. Accordingly, they sought to buttress their position by marshalling what they, not ineptly, describe as a "litany" of offenses to justify the discharge of Jackson. Thus, Respondents point out that Jackson was reprimanded on March 12, 1973, for trying on clothes in an unauthorized area; on March 26, 1973, for

punching the timeclock improperly; on March 25, 1973, for again trying on clothes in an unauthorized area; on March 31, 1973, for engaging in union solicitation on the selling floor; on April 6, 1973, for leaving the store through the wrong exit; on May 12, 1973, for again punching her timecard improperly; and, also, on May 12, 1973, for disobeying the order of a supervisor.

Extended discussion of this "litany" of offenses would be superfluous. Suffice it that considerable evidence was adduced to show that these offenses, to the extent they occurred at all, were inconsequential and not atypical in that other employees also engaged in them. The fact is that these asserted derelictions, advanced to buttress the asserted ground for discharge, had never been considered, either individually or collectively, as warranting anything more than a reprimand, often merely an oral reprimand. Moreover, what cannot be overlooked is that all of the asserted derelictions allegedly occurred and were noted only after the onset of organizational activities in which Jackson admittedly participated. Indeed, Irving Mendelson, as area supervisor of the Northland store among others, testified that he learned of Jackson's offenses only after he had knowledge of her union activities and had heard no complaints about Jackson before then. Apparently, whatever offenses Jackson may have committed became serious only after her union activities became known.

To be sure, it is not Respondent's burden to establish the legality of Jackson's discharge. Any reason or

no reason at all is sufficient. The burden of illegality is for General Counsel to establish and the critical question is not whether the asserted grounds for discharge were sufficient to justify the discharge but rather whether they were the true reason for the discharge. Conversely, the question is whether the discharge was really motivated by Respondent's antipathy to the organizational campaign and Jackson's role therein.

Based on the foregoing analysis and on all the evidence of record, I conclude that the variety of grounds asserted for Jackson's discharge were really pretexts, contrived to mask the real reason for the discharge. The insubstantial nature of those grounds and the fact that Jackson's work performance, unimpeachable before union activities began, suddenly became subject to frequent lapses thereafter, cogently support the inference that the real reason for the discharge lay in her union activities. The discharge occurred on May 23. At that point the organizational campaign was making headway. On May 10 the Union had won an election in the neighboring Universal Mall store. Action had to be taken to stem the organization effect.

Accordingly, I conclude and find that the discharge of Rose Jackson was to discourage Union activity and was violative of Section 8(a)(3) and (1) of the Act.

2. Deborah Rowan

Deborah Ann Rowan worked at the Alberts Lincoln Park store from the summer of 1971 until her dis-

charge on May 29, 1973. Rowan started as a salesgirl for a brief period, then worked as a checker in the fitting room, and during the last year of her employment worked in the stockroom as a part-time employee. Until April of 1973, Mannino was manager of the Lincoln Park store and Sophie Fields was assistant manager. Thereafter Mannino left and Fields took over as manager.

It is undisputed that Rowan was quite active in behalf of the Union during the organizational campaign and that management was aware of her activity in that regard. Rowan was among the employees present at the April meeting in the Four Vees lounge and was seen there by Patrick Casey. As already noted also, Rosario Criscuolo, manager of the Detroit Shoe department at the Lincoln Park store, advised Rowan that he knew of her union activity and told her not to get mixed up in it. Fields also admitted that she was aware of Rowan's union activity when she discharged Rowan.

The circumstances attending Rowan's discharge are also not in dispute. Rowan testified that she had decided to take off on the Memorial Day weekend. Accordingly she did not report to work on Saturday, May 26. Sunday was not a scheduled workday for Rowan. Rowan, according to her testimony, went up north for the weekend, called her mother from there, and told her mother to report to the store that she was sick. Rowan admitted that this was a lie; she was not ill. Rowan further testified that she returned home

Sunday night but was unable to reach Fields. The store was closed on Monday because of the holiday. Rowan did reach Fields by telephone on Tuesday. According to Rowan, Fields told her in that conversation that she was being let go because Fields wanted a full-time employee instead of a part-time employee. Rowan suggested that she could work full-time because she got home from school by 12:30 p.m. and could then go directly to work, to which Fields responded that Rowan was going to be let go anyway. After wishing her a speedy recovery from her illness Fields terminated the conversation. Except for an occasional shopping trip, Rowan has not returned to the Lincoln Park store.

Fields confirmed that she had terminated Rowan's employment in a telephone conversation on Tuesday morning, May 29. Fields explained that the other stockgirl in the store, also a part-time employee, Sandy Bordeau, had quit a week earlier and that a part-time stockboy who did the same kind of work had quit about the same time. Fields testified further that Rowan did not do her work properly and that she, Fields, had frequent occasion to speak to Rowan on that subject dating back to the time she, Fields, was assistant manager. Rowan also had a record of absenteeism, much of it due to illness. Fields confirmed that she had received a call from Rowan's mother on the Memorial Day weekend reporting that Rowan was ill and that Rowan herself called in on Tuesday morning. According to Fields, she told Rowan that she had already planned on terminating Rowan's employment, that the other

part-time girl had quit, and that she had decided to replace both part-time girls with a full-time employee. Fields testified that Rowan replied, "all right." Thereafter, Fields did hire a full-time employee who was still working at the Lincoln Park store as of the time of the hearing.

Respondents do not seize upon Rowan's unjustified absence on the Memorial Day weekend and her admitted falsification in that regard to justify Rowan's discharge. Instead, Fields candidly admitted that the decision to terminate Rowan antedated that incident. The reasons given for the discharge were twofold: (1) that Rowan was not performing her job properly; and (2) that it was decided to hire a full-time employee to replace Rowan and the other part-time employee who had quit.

So far as Rowan's work performance was concerned it does not appear that she had received any written reprimands. However, on cross-examination, Rowan acknowledged that her work had been frequently the subject of criticism not only from Fields but also from the new assistant manager of the store. Her record of absenteeism was also a major factor notwithstanding that, in many instances, the absences were genuinely due to illness. The decision to hire a full-time girl to replace Rowan and the other part-time stock employee is certainly explicable in view of the situation that arose when one of two quit and the other had a record of absenteeism and poor work performance.

Certainly here, as in the case of Rose Jackson, Respondents' antipathy to unionization and the knowledge that Rowan was active in that regard prompts the idea that this may have been in whole or in part the motivation for her discharge. However, in Rowan's case, unlike Jackson's case, such an inference would be strained. Jackson was a top performer. Rowan was not. The reasons advanced to justify Jackson's termination were vulnerable. Not so in Rowan's case. Certainly, the quitting of the other part-time stock employee was not contrived. Nor can the business judgment to replace two part-time stock employees with one full-time stock employee be challenged. Indeed, this is precisely what was done.

Under all the circumstances and notwithstanding the fact that Respondents may have welcomed the termination of an active union adherent, I find inadequate evidence to establish that Rowan's union activities played a role in her termination. Accordingly, I conclude and find that a violation of Section 8(a)(3) or (1) of the Act with respect to the discharge of Rowan has not been established.

3. Joseph Frezza [9]

Joseph Frezza was hired as a part-time stock employee at the Universal Mall store in March 1973 and remained in that position until May 1973. The only other employee at that store who did stock work exclusively was James Bromm who had been hired a

[9] As indicated at the outset, the legality of the discharge of Joseph Frezza was not in issue at the initial stages of this proceeding. It became an issue when a new complaint was issued and by order of the Board consolidated with the earlier proceeding.

month before Frezza and was also a part-time employee. Frezza was discharged a few days after the May 10 election at the Universal Mall Store.

General Counsel takes the position that Frezza was discharged and later refused reinstatement because he engaged in Union and other protected activities. In that regard the record establishes, and I find, that Tlumak, the Universal Mall store manager, and President Klinsky also, had strong reasons to believe that Frezza was a union adherent.[10] Certainly this belief, against the background of Respondent's demonstrated animosity towards unionization, affords basis for speculation that Frezza's discharge may have been motivated by his union sympathies.

On the other hand, there is undisputed evidence, which I credit, that the discharge took place around Mother's Day, that there is a normal seasonal business decline in the volume of goods shipped into the store during this period because the store has been fully supplied with stock for the new season, and that there was not enough work during the Mother's Day period to warrant the retention of the two stock employees.

Frezza was the junior employee of the two in terms of seniority and he was scheduled for layoff. The testimony of both Tlumak and Frezza is in accord that Tlumak told Frezza he was being let go because of a shortage of work and that Tlumak would recall

[10] It is unnecessary to recapitulate here the discussions between Tlumak and Frezza and between Klinsky and Frezza which provide the basis for this finding.

him when his further services were required. No claim was or is made that Frezza's work was unsatisfactory. Both Frezza and Bromm were regarded as satisfactory workers.

Bromm, the other part-time stockboy, quit his employment voluntarily about a month after Frezza was let go. For more than a month thereafter the store had no stockboys and what stock work had to be done was done by other employees and by Tlumak himself. Tlumak did not seek to recall Freeza because, as Tlumak testified, he had been informed by one of the other employees that Frezza was already working elsewhere. Tlumak made no effort to verify this report. But he did call Martin Felder, personnel director for Alberts, about finding a replacement to do the stock work. The result of discussions with Felder was that a determination was finally made not to replace the two part-time stockboys at all but, instead, to hire one full-time maid. The reason for this decision was that a full-time maid could do much of the stock work and, in addition, service the ladies' fitting rooms and lounges, a function male employees could not perform. The use of a maid instead of stockboys had already been applied in other stores in the Alberts chain.

Tlumak followed this procedure. A full-time maid was hired. No stockboys have since been hired to replace either Frezza or Bromm.

In this state of the record it is urged, nonetheless, that the real reason for discharging Frezza was be-

cause of Respondent's antipathy to his union sympathies and that, even assuming an otherwise valid business reason for the termination, if the evidence warrants a determination that Frezza's Union activities entered to any extent into the discussion to discharge him, that discharge is violative of the Act. Additionally, it is argued that even if Frezza's discharge was lawful the failure to recall him and the ready acceptance, without verification, of the report that Frezza was working elsewhere were prompted by Frezza's known union sympathies and hence a finding of unlawful refusal to reinstate is called for.

These contentions, if supported by the evidence, certainly have warrant in the law. But in my view here, as in the case of Deborah Rowan, while the record certainly affords ground for suspicion, the burden of proof which lies on General Counsel has not been fulfilled. It is undisputed that there was a shortage of stock work at the time of Frezza's termination and he was the junior of the two stockboys, both of whom, as Respondents concede, were satisfactory employees. The later choice to replace both part-time stockboys with one full-time maid had valid business reasons to support it and was a procedure previously adopted by Alberts in other stores. Tlumak's failure to recall Frezza when Bromm quit, or to seek to verify the report that Frezza was working elsewhere, might be blameworthy but there is insufficient probative evidence to establish that this failure and omission were attributable to Frezza's union activities or sympathies. Mere suspicion is not enough.

In sum, I conclude and find that the record does not establish by a preponderance of the evidence that the discharge of Frezza and the refusal to reinstate him were violative of Section 8(a)(3) and (1) of the Act.

F. Respondents' Refusal to Bargain and to Furnish Relevant Information

As already noted herein, the Union was certified on July 2, 1973, as the exclusive bargaining representative of Respondents' employees at the Universal Mall store comprising an appropriate unit as hereinbefore described. Following that certification the Union requested Respondents to bargain concerning those employees and also made a request that Respondents furnish the Union with relevant data concerning the wages, hours, and other terms and conditions of employment of those employees. Respondents admit that they denied both requests.

The issue is purely one of law. The certification establishes the legal obligation of Respondents to respond affirmatively to both requests. Respondents do not question this proposition of law, but they urged at the instant hearing that the certification was invalid and hence that they had no lawful obligation to bargain or to furnish the information sought. Respondents predicate this defense on two grounds: (1) that the unit certified was not an appropriate unit; and (2) that Respondent's objection to the election, based on the Union's preelection promise to waive initiation fees if the Union became the bargaining representative, was erroneously rejected.

With respect to the first ground, the record shows that the Regional Director found a single-store unit as hereinbefore described appropriate and the Board thereafter denied Respondents' request for review of that determination because no substantial issue warranting review was presented. Respondents present no newly discovered evidence relevant to that determination but merely repeat their position, previously litigated in the representation hearing, that the unit described is not appropriate. Respondents acknowledge their awareness of the well-settled rule against relitigation of representation issues in subsequent 8(a)(5) proceedings but assert that there are special circumstances here present which warrant relitigation. Respondents adduce no showing of special circumstances to support this naked assertion. The Board's prior determination is binding on me. The objection based on the inappropriateness of the unit is rejected.

The second ground on which Respondents rely is their claim that the May 10 election was tainted because the Union promised in its preelection propaganda to waive initiation fees if the Union became the bargaining representative. In that respect, too, the Regional Director in the representation proceedings had found Respondents' claim to be without merit and Respondents' request for review was again denied by the Board for want of a substantial issue.

The rule barring relitigation of representation issues, previously described, would normally be ap-

plicable here also. However, in the instant case between the close of the first phase of the hearing herein and the reopened phase of the hearing, the Supreme Court on December 17, 1973, issued a decision in *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270. Respondents now rely on that decision to renew their objection that the Union acted improperly in offering a waiver of initiation fees and have filed a "Motion to Dismiss 8(a)(5) charge." General Counsel, in turn, has filed a response opposing that motion.

Analysis of the *Savair* decision, in my view, gives no support to Respondents' contention. The question presented in Savair was "whether the Board properly concluded that a union's offer to waive initiation fees for all employees who sign union authorization cards *before a Board representation election,* if the Union wins the election, does not tend to interfer with employee free choice in the election." *Id.* at fn. 4. The Supreme Court held, contrary to the Board, that such conduct did tend to interfere with a free election. It is this holding on which Respondents rely for support of their motion to dismiss the refusal-to-bargain allegations.

It appears, however, that Respondents overstate the *Savair* holding when they argue that the Supreme Court "held that a promise of waiver of initiation fees by a union is coercive and taints election results." As shown by the question presented and by the majority opinion, the gravamen of the offense in *Savair* in the Court's view lay in the fact that the union gave a

special inducement to those employees, *and those employees only,* who signed authorization cards before the election, and that employees who failed to do so could presumably be subject to the payment of initiation fees. The Court read this disparate treatment as having an effect of forbidden interference with the election. Indeed, in the closing paragraph of footnote 4, the Court suggests that the situation in *Savair* itself could have been remedied by making the waiver of initiation fees "available not only to those who have signed up with the union before an election but also to those who join after the election." That was precisely the situation in the instant case.

In the instant case there was no disparate treatment. If the Union lost the election, none would be required to pay initiation fees; if the Union won the election, none would be required to pay initiation fees. Indeed, the evidence submitted revealed that this was the Union's policy not only in the instant organizational campaign but in all instances where the Union was the beneficiary of a certification. In these circumstances, I find no basis for a finding that the Union's conduct in telling the employees before the election that their initiation fees would be waived in any way tainted the May 10 election.[11]

[11] I deem it unnecessary, in view of the discussion in the text, to consider the argument that the instant case where the employees chose the Union by a substantial margin is further distinguishable from *Savair* where the Court repeatedly notes that the union's victory there was by a single vote.

Accordingly, I conclude and find that the objection based on the Union's waiver of initiation fees is without merit and that Respondents' motion to dismiss the allegations of Section 8(a)(5) should be, and hereby is, denied. I find further that the valid certification here issued created a lawful bargaining obligation binding on Respondents and that Respondents' admitted failure to bargain and to furnish wage and other relevant data concerning the employees in the appropriate unit violated Section 8(a)(5) and (1) of the Act.

This holding is dispositive of the matter and makes it unnecessary to deal at any length with General Counsel's alternative contention that, even absent a valid certification, a bargaining order is warranted here under the guidelines set forth in *N.L.R.B. v. Gissel Packing Co.* 395 U.S. 595 (1969). In sum, it is General Counsel's position that the broad pattern of unfair labor practices engaged in by Respondents justifies a bargaining order here even without an election. In this connection, General Counsel cites the Board's recent decision in *Joseph J. Lachniet, d/b/a Honda of Haslett,* 201 NLRB 855 (1973). In that case the Board issued a bargaining order notwithstanding that a prior election which the union won had been set aside, in part because of improper conduct by a union observer.

What General Counsel overlooks, however, is that the record in *Lachniet* contains an independent showing of majority status which is based on valid authorization cards, and hence reliance on the results of the

election to demonstrate majority status was unnecessary. In these circumstances the Board concluded that the gravity and pervasiveness of the employer's unfair labor practices warranted a bargaining order.

This case is quite different. The record here contains no independent evidence, and General Counsel tendered none, to show that the Union was the designated choice of the majority of the employees in the appropriate unit. That showing derives only from the results of the election. Assuming, *arguendo*, that the election was tainted, as Respondents argue, not only would the certification flowing from the election be invalid, but so, too, would any showing of majority predicated on that election. General Counsel cites no case, and I am aware of none, in which the Board has issued a bargaining order where the majority status of the bargaining representative has not been established. I find General Counsel's alternative basis for a bargaining order without basis in the record.

Conclusions of Law

1. Alberts, Inc., and Detroit Shoe Company are, and have been at all times relevant here, joint employers of the employees in those stores of Alberts, Inc., in the Greater Detroit Metropolitan area in which the Detroit Shoe Company has selling locations.

2. Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL–CIO, is, and has been at all times here relevant, the exclusive bargaining representative of all full-time and regular

part-time selling and nonselling employees employed by Alberts, Inc., at its Universal City Shopping Center Store, including employees of Detroit Shoe Company, but excluding professional employees, guards and supervisors as defined in the Act.

3. By engaging in surveillance of a union meeting at Froling Bowling Lanes on or about May 4, 1973, Respondents violated Section 8(a)(1) of the Act.

4. Respondents did not engage in unlawful surveillance at the Four Vees Lounge on or about April 12, 1973.

5. By granting wage increases to employees to dissuade them from supporting the Union and to influence their votes in a forthcoming election, Respondents violated Section 8(a)(1) of the Act.

6. By coercively interrogating employees by threats and promises of benefit, by creating the impression of surveillance of Union activities, and by soliciting employees to submit their grievances to management and not to the Union, all to the end of discouraging unionization, Respondents violated Section 8(a)(1) of the Act.

7. By promulgating and publishing an otherwise valid no-solicitation rule for the purpose of interfering with the employees' right of self-organization, Respondents violated Section 8(a)(1) of the Act.

8. By unilaterally changing working conditions of employees following an election in which the employees following an election in which the employees designated the Union as their bargaining representa-

tive, Respondents violated Section 8(a)(1), (3), and (5) of the Act.

9. By discharging and refusing to reinstate employee Rose Jackson because she engaged in union activities, Respondents violated Section 8(a)(3) and (1) of the Act.

10. The preponderance of the evidence does not warrant a finding that Respondents violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate employees Deborah Rowan and Joseph Frezza.

11. By refusing to bargain collectively with the certified Union upon request and by rejecting the Union's request for information as to wages and other relevant data concerning the employees which the Union represented, Respondents violated Section 8(a)(5) and (1) of the Act.

12. The unfair labor practices found herein affect commerce within the meaning of Section 2(6) and (7) of this Act.

REMEDY

To effectuate the policies of the Act and to enforce its mandate, I will direct Respondents to cease and desist from the several unfair labor practices found. Because of the varied character and broad scope of these unfair labor practices, a broad remedial order is warranted and I shall direct that Respondents cease and desist from trenching in any manner upon the rights guaranteed their employees under Section 7 of the Act.

Appropriate affirmative action will also be directed. In respect to Rose Jackson, I shall direct that she be reinstated in the manner customarily prescribed by the Board and with no prejudice to any rights, benefits, or privileges she formerly enjoyed. I shall further direct that she be made whole for lost earnings, computed on a quarterly basis with interest at 6 percent as prescribed in *F. W. Woolworth, Co.*, 90 NLRB 289 (1950), and in *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962). The usual provisions regarding recordkeeping, reporting requirements, and notice posting will also be included.

Inasmuch as Respondents here are involved in multistore operations, the problem of the posting of notices is more than routine. Alberts, Inc., has a three-state operation. However, the organizational campaign here was confined to stores in the Greater Detroit metropolitan area and in these circumstances a prudent discretion would counsel against the necessity or propriety of posting notices in Alberts, Inc., stores throughout the three-state area. The record also does not show, with any specificity, to what extent the organizational campaign of the Union and Respondents' campaign affected all 24 stores, which General Counsel alleges and Respondents admit, comprised the Greater Detroit metropolitan area stores. Moreover, it is clear that, as of time of the instant proceedings, Detroit Shoe Company had selling locations in only about 10 of these 24 stores. Nevertheless, insofar as Alberts, Inc., is involved in the commission of

unfair labor practices here found, and its role in that regard is substantial, it is reasonable to infer that this information would have reached employees in all the stores in the Greater Detroit metropolitan area which are geographically quite contiguous. These employees could and would be, quite naturally, apprehensive as to their security against interference with the exercise of their statutory rights to organize and bargain collectively. Accordingly, I deem it appropriate to, and will, direct that the notices herein direct that the notices herein directed be posted in all of the Alberts, Inc., stores located in the Greater Detroit metropolitan area.

Nothing in the Order, however, shall be construed as requiring Respondents to withdraw from employees any increases which it unilaterally granted them.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I shall recommend the following:

ORDER [12]

Respondents Alberts, Inc., and Detroit Shoe Company, their officers, agents, successors, and assigns, shall:

[12] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Engaging in surveillance of employees in the exercise of their rights to self-organization as guaranteed in Section 7 of the National Labor Relations Act, as amended.

(b) Granting wage increases to employees to discourage their union or other protected activities.

(c) Coercively interrogating employees concerning their union or other protected activities.

(d) Threatening, or promising benefits to, employees in derogation of the rights guaranteed them in Section 7 of the Act.

(e) Creating the impression among the employees that their union or other protected activities are under surveillance by management.

(f) Soliciting employees to bypass the Union in their presentation of grievances and to bring their grievances directly to management.

(g) Promulgating and enforcing a no-solicitation rule for the purpose of interfering with organizational rights of employees.

(h) Unilaterally changing working conditions of employees without consulting or bargaining with the designated representative of the employees.

(i) Discouraging membership in Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL–CIO, or in any other labor organization, by discharging or otherwise discriminating against any person in regard to hire or tenure of employment or any term and condition of employment.

(j) Refusing to meet and bargain collectively concerning wages, hours, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of all the employees comprising the unit described hereunder:

> All full-time and regular part-time selling and nonselling employees employed by Alberts, Inc., at its Universal City Shopping Center Store, including employees of Detroit Shoe Company, but excluding professional employees, guards and supervisors as defined in the Act.

(k) Refusing to furnish data requested by the above-named Union relating to wages, hours, and other terms and conditions of employment of the employees comprising the above-described unit.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(a) Offer Rose Jackson immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for lost earnings in the manner set forth in the portion of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to compute the amount of lost

earnings due Rose Jackson under the terms of this Order.

(c) Rescind the rule against solicitation herein found to have been discriminatorily promulgated and enforced, and expunge from the personnel records of Rose Jackson any reference to warnings or reprimands directed to her for violation of this rule.

(d) Upon request, bargain collectively with the above-named labor organization as the exclusive bargaining representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Upon request furnish the above-named labor organization with appropriate data concerning wages, hours, and other terms and conditions of employment of the employees comprising the appropriate unit described above.

(f) Post at all Alberts, Inc., stores in the Greater Detroit metropolitan area copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being duly signed by authorized representatives of Respondents, shall be posted by Respondents

[13] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the word in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 7, in writing, within 20 days of the date of this Order, what steps Respondents have taken to comply wherewith.

IT IS ALSO ORDERED that the complaint herein be dismissed insofar as it alleges unfair labor practices not found herein.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in surveillance of your activities with respect to your right to organize and bargain collectively or to refrain therefrom.

WE WILL NOT create the impression that we are engaging in such surveillance.

WE WILL NOT grant wage increases to discourage union or other protected activities.

WE WILL NOT question you concerning union matters.

WE WILL NOT threaten, or promise benefits to, you in derogation of your right to organize and bargain collectively, or to refrain therefrom.

WE WILL NOT solicit you to bypass your bargaining representative in the presentation of grievances and to bring your grievances directly to us.

WE WILL NOT promulgate or enforce a no-solicitation rule for the purpose of obstructing your organizational and collective-bargaining rights.

WE WILL NOT unilaterally, and without consulting with your bargaining representative, change your working conditions.

WE WILL NOT discharge or otherwise discriminate against any of you to discourage you from engaging in union activities.

WE WILL offer Rose Jackson her old job back and we will pay her for earnings she lost as a result of her discharge.

WE WILL expunge from Rose Jackson's record any reference to violation of our no-solicitation rule.

WE WILL meet and bargain upon request with Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL–CIO, as the exclusive bargaining representative of all our employees included in the description below about their wages, hours and working conditions and, if agreement is reached, we will sign such an agreement.

The bargaining unit is:

> All full-time and regular part-time selling and nonselling employees employed by Alberts, Inc., at its Universal City Shopping Center Store, including employees of Detroit Shoe Company, but excluding professional employees, guards and supervisors as defined in the Act.

WE WILL, upon request, furnish data to the above-named labor organization relating to wages, hours, and other terms and conditions of employment of the employees covered in the above description.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in your rights guaranteed by Section 7 of the National Labor Relations Act as amended.

ALBERTS, INC.,
(Employer).

Dated By
(Representative) (Title).

DETROIT SHOE COMPANY,
(Employer).

Dated By
(Representative) (Title).

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313–226–3210.

U.S. GOVERNMENT PRINTING OFFICE: 1977